RIGHT TO PROPERTY AND THE INDIAN CONSTITUTION

Tagore Law Lectures delivered January/February, 83

M. HIDAYATULLAH
M.A. (Cantab). D.Lit., LL.D.,
of Trinity College, Cambridge,
and Hony. Bencher, Lincoln's
Inn, Former Chief Justice of India
Vice-President of India.

L E C T U R E I

PRE AND PROTOHISTORY

L E C T U R

PRE AND PROTOHISTORY

I am glad that after such a long time I am at last before you to deliver my lectures on the subject of property with special reference to India. Objects which can be the subject of possession and ownership are of many kinds and each kind receives separate treatment in law. Thus land and buildings which are known as immovable property, have their own sets of laws; mines and quarries, which are also immovable property have other laws; trees, forests, although part of the soil in which they grow, have yet other rules governing them. Movables have different laws to govern their ownership and possession and there are many kinds of immaterial properties like actionable claims, mortgages, leases etc., with congeries of laws governing them. There is intellectural property like books, authorship of books, copy-rights, inventions and artistic creation and finally there are the earnings of persons gainfully employed. All these did not begin simultaneously. As Society grew, the objects of possession and ownership became more and more varied and the enjoyment of these objects got differently regulated in Society. However, the notions developed slowly and it has taken several millennia to reach the regulations one finds today. To trace this development over so many centuries is necessarily a long affair because each phase in the development is surrounded by detailed analysis and examination. Hundreds of books have been written on each aspect, some philosophical, some analytical and some merely historical.

Therefore, to unravel the mysteries of the growth of the notions of property over centuries, one needs to spend a whole lifetime and I cannot claim that I have spent anything like this much time in the study of this vast subject. However, the most outstanding

aspects are simpler to describe and seen in a continuous perspective give one the necessary equipment to understand and appreciate the way different people have viewed and still view the problem.

In these nine lectures I have attempted to analyse the many steps in the development of the outlook and then have tried to synthesise our approach to the multifarious problems in the growing concept of a Welfare State. As we proceed you will notice, how, from primitive notions we get to the requirements of today, how Society has adjusted itself and again and again readjusted its views and how we are still struggling to find a via media in which the interests of the individual can be reconciled with the interests of Society as a whole. You will notice how the progress was slow in some parts of the world and sudden and cataclysmic in others. In some countries existing rights were overturned by revolution and in others by legal processes. The story in India presents a fascinating panorama from the recognition of vested rights to their breakdown and abolition. You will view how we too had problems of divided opinions and how we overcame some fixed notions of vested interests. Incidentally in this, I played some part which, reluctantly enough, I shall have to mention. Of this fact I shall speak in the last of these lectures. Meanwhile I shall trace and explain in the first eight lectures how the thoughts moved in that direction slowly but surely and how the final push came in India.

These lectures are intended to trace, generally, the changing ideas concerning rights in private property with special reference to land. Property, in which sometimes, but not always, 'contract' is included

occupies the most important position in institutional economics. Jural relations between individuals stem mostly from family bonds or from ownership, possession and enjoyment of property. By far the largest number of organisations of society in India, are in relation to private property, and they are the main theme of these lectures. But the present attitude is the result of centuries of experiences and ideas and we must thus look back on history since it furnishes the background of the ideas of today. It is only then that we are able to see actions in their true perspective and understand their implications. In the present day thinking most of our ills are attributed, in some form or other, to free ownership and enjoyment of property. Thus we see constant curtailment of the right to own and enjoy private property in almost all its forms - lands, buildings, chattels, means of production, capital, incomes and even contracts. In institutional economics, property had varying importance at different times and even today ideas respecting it are in a state of flux and nothing is constant. Time was, when even human beings were in bondage. Property they did not own, but were themselves property. From slavery to serfdom was the next stage. Thus property was regarded differently when it passed from the stage of community enjoyment to private enjoyment and back to the position when private property weakened in the face of growing ideas of socialism and communism. However, in dealing with property we are not really concerned with the philosophies underlying the concept. I am not going to examine the subject in the spirit of an Ihring,[1] or a Kocourek[2] or a Kelson.[3] I am concerned, first and last, with the conflict between private and

communal ownership and the State's interference with such ownership and enjoyment. It is in the last area that we find most changes. The evolution of our ideas makes a fascinating study when seen historically and that tells us what has been done and what may be expected in the future. With these short introductory remarks let me get into the subject.

Property as defined in dictionaries means the right, specially the exclusive right, to possession, use or disposal of any thing. It is the act of 'appropriating' or making 'proper' to oneself some part of the resources of the universe.[4] Austin[5] said "property taken in its strict sense denotes a right, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing." Noyes,[6] who has examined many definitions rendered by Courts from time to time and some accepted by economists, describes it as a protected right or bundle of rights with direct or indirect regard to any external object (other than the person himself) which is material or quasi-material and which society permits to be either private or public.

The question, therefore, arises: Are there any natural rights to property, or are they real only to the extent that the acceptance of appropriation is shared by the community even without the force of law behind it. Law adds a force only if the community is prepared for it or is required to submit to it. When there is a law, the claimant has a right to have his title established against those who interfere with it. Natural rights mean that the instinct and tradition of the community justify a person in claiming the rights,

in supporting his claims and making them available against others, imposing corresponding duties at the same time and defining the extent and mode of enjoyment of the rights. Two separate concepts are involved here. The right is one thing and the object of the right is another. The rights, when they inhere in a thing, are called proprietory rights and that thing is called 'property'. The rights are mere abstractions, although the thing is a reality. The duty owed to the proprietor is through the compulsion of society and the exercise of proprietory rights goes only so far as the community and in the final analysis, the laws allow.

The notion of property is instinctive in man as it is in animals. A dog finding a bone considers it as his own and fights another dog over it. A primitive man, without any understanding of the concept of property, if he caught a fish or snared an animal or gathered some fruits, was imbued with the same instinct and resisted interference by another. He was exercising and asserting a right of private property. At that time his might alone protected his possession and enjoyment. As time passed and society grew more complex, ownership, possession and enjoyment of property came to be regarded as rights which society must protect as legal rights.

This is only a bare analysis of the right. The views on private property, however, have not been so uniform. Rather the views proceed in opposite directions. When Governments were established, it became one of the functions of Government to protect private property, so much so, that Blackstone[7] declared that Governments only existed for giving this protection. James Madison[8] said

that 'the personal right to acquire property, which is a material right, gives to property, when acquired, a right to protection as a social right'. As against this Proudhon[9] regarded exclusive property as theft and Bernard Shaw considered this as the only perfect truism that had ever been uttered.[10] Thus there is a wide gap between the rival concepts: whether, on the one hand, we believe with Edmund Burke[11] that property perpetuates society itself or as Mackintosh[12] put it, it is 'the sheet-anchor of society' or on the other hand with Jean Pierre Brissot[13] that it is 'un vol dans la nature,' (a theft against nature). Carlyle[14] summed it up by saying that the State to the discontented is 'a taxing machine' and to the contented a 'machine for securing property.' These are the two extremes within which all notions of property lie today in our country.

To understand the different phases of our inquiry, we must necessarily begin with the earliest times. A detailed study of such a problem in the distant past belongs to the domains of anthropology and archaeology. We do not even know for certain when man made his advent on this globe. The world is much older than 23rd October 4004 B.C. which Archbishop Usher and the Hebrew texts said marked the creation of the world and 28 Oct.4004 B.C. as the date on which Adam was created. According to Septuaginta the pre-Christian Greek version of the Old Testament, the date is 5872 B.C. These accounts shrink the age of the world too much and do not accord with modern discoveries. Indeed no less than 140 different dates have been assigned to the creation of the world. It would be useless for us to find whether China was founded by Fohi or Noah, any more than if Noah went under the names which Bryant[14] has given. So inaccurate are these chronologies that it is commonly not known that Christ was born five years before Anno Domini and he was baptised by John, the Baptist in 27 A.D. The

only event of significance in 1 A.D. was the peace which J. Caesar made with the Parthians. If we believe Chinese mythology, the world originated only in the 3rd and 4th Century A.D. and it began when two powers Yin and Yang came out of Chaos and brought forth a man named P'an Ku who made the universe out of Chaos and himself got absorbed in the earth, the heavens and the universe.[15] The Hindu philosophy, as to creation is contained in the Brhad-aranyaka Upanishad where the asvasya Medhyasya, the sacrificial horse, represented the world and Praja-pati created it out of himself.[16] These are the conflicting views of cosmogony and none of them is scientific.

All these and many other mythological creations of the world do not accord with scientific discoveries now well-established and confirmed by carbon-14 tests which have helped to make very successful studies of dating of archaeological and biological specimens. Human history goes back thousands of years. When we consider that town life began as early as 7000 B.C. and old Kingdoms were established in the 4th millenneum before Christ, we get a different picture of the human family. The evidence of how property was then enjoyed is extremely slender and the conclusions amount to good but reasonable surmises. However, the theories evolved by anthropologists are so logical and scientific that much doubt really does not exist. There are extant still on the earth, some communities which bear a resemblance to the peoples who must have existed in the dark ages and anthropologists and antiquarians are able to illustrate their theories by modern examples.

In this lecture, the first in the series, an attempt will be made to discuss how property was enjoyed in pre and protohistory. In the limited dimensions of a single lecture it may not be possible to give more than a general outline, leaving out vast areas of the globe, but the narrative will be made sufficiently representative and illustrative of the main trends and detailed enough to connect this period with later periods in human history.

In tracing man's progress it is usual to describe five ages in the growth of the human family. They are the Early Stone Age, Later Stone Age, the Copper Age, the Bronze Age and the Iron Age. Of course Hesiod,[17] the Greek Poet, described them conversely as the Golden, the Silver, the Bronze, the Heroic and the Iron Ages. His belief was that humanity had degraded itself in moral values from the Golden Age to the Iron Age and some of us might even be inclined to share his views.

It must not, however, be thought that the above classification is absolute. The five ages stood sub-divided into narrower limits. The Stone Age was divided into five periods. These periods were then followed by the period known as Azilian, which itself stood subdivided into other stages. I have named these only to show that many finer classifications existed. If we tried to cover each period, we shall fail for want of evidence and we shall require, if we succeeded in obtaining it, quite a few lectures or series of lectures. It is sufficient to say that in all these periods there were many common ideas about rights in property and tracing those common features is all that is

intended here. Therefore, there will be no reference to different periods but a combined approach to all of them.

These ages, by whatever name we may wish to call them, were not sharply divided. They gradually passed from the first to the second and from the second to the third and so on, with considerable periods of overlap. It is, therefore, obvious that there is no possibility of writing a continuous history of these times applicable to the whole world. Evidence of social institutions going back some ten millennia or so before our own times, is extremely slender and much of it has literally been unearthed by archaeologists. Even so the evidence is confusing in the extreme as layers upon layers of human history are found buried underground at greater and greater depths. The Tel-al-Hesy excavations in Palestine have uncovered deposits at different levels down to a depth of sixty feet and more. There are numerous Tels (hills) which are yet to be opened. In Crete the Neolithic deposits go down to 26 feet and represent different periods of proto-history. Similar is the case at Mohenjodaro and excavations at Ujjain have uncovered a very early civilization.

Further the early attempts of antiquarians were to reconstruct only political institutions. Thus Niebuhr,[18] Thirwall,[19] Grote,[20] and others almost entirely deal with proto-history from this angle. It is only in comparatively recent times that attention has been directed to social institutions. Again progress on this work has not been uniform. As W.J. Perry[21] said "Civilization is not a stable product. It is subject to convulsions". While in Mesopotamia

metal was used as far back as 5000 B.C. in Egypt in 4000 B.C. and in India in 3000 B.C., Europe was comparatively backward. Again by the third millennium B.C. city states had grown in Mesopotamia such as Memphis, Heliopolis and Thebes and in Egypt such as Ur, Earch, Adab and Kish, but in Europe man was eking out a miserable existence with stone implements. And yet later in Europe progress was more rapid than elsewhere and what was achieved by other countries in centuries was achieved in Europe in decades.

Therefore, in dealing with early social organisations it is not possible to discuss social structures existing in different parts of the world at a given time. Attempt will be made only to discover the processual evolution of human society generally, with reference to a time-calendar, and the study, will be confined to domestic, rather than political attitudes and institutions.

In early history the human family was composed of food-gatherers. There is consensus among writers on the subject that they were centred in Egypt, the Aegean Archipelago, Crete, Sumer, Elam, Syria, Asia Minor, India, China, Turkestan, Baluchistan, the Danube Valley, the Balkans, Greece, Italy and Middle Euphrates. There were similarly areas in other parts of the globe but it is not necessary to mention them. Man is a gregarious animal and even in these primitive times there was a sense of a 'family'. This family consisted of a man and a woman and their progeny. Thus the most elementary social organisation was the family. When human society was thus composed, the structure in the words of G.D.H. Cole[22] was almost devoid of social functions. The family had elementary notions of division of labour since their whole occupation was

to find food. The bond was domestic and not even elementarily political. This stage is not to be confused with other stages when more classifications grew. Society had not yet reached the stage when people began to be grouped according to their occupations for in this period everyone was expected to do anything and everything, necessary for existence and that was only finding food.

The food-gatherers[23] ordinarily had no permanent dwellings. They gathered their food, from wherever they could find it. They had not yet learnt to plant trees or to sow crops or to domesticate animals. They hunted without weapons which they had not yet learnt to make. They knew the use of fire which they made by striking flints or rubbing dry sticks but they had no belongings which could be called property. They roamed over vast territories in search of food, unless they found a permanent source sufficient to sustain them. If food failed in one area they moved to another. Economic communication in such a society was almost non-existant. Even the notion of a head-man was in an elementary stage. There was no ownership of lands or goods as we know it. In so far as land was concerned an elementary notion of property in it, perhaps, arose from the fact that a particular territory was occupied by them. Property in goods was realised in food gathered by a family. An intruder who came to hunt or gather food in the territory was resisted and if some food was gathered or an animal was caught or killed, the family regarded it as 'property' and resisted seizure by another. The right to cut a tree or take its fruit was regarded as belonging to him who

first appropriated it for his own exclusive use, but fruit growing on trees or on the ground and a tree blown down were for any body to take. Rights of a sort of proprietorship were, however, most prominently noticeable in family relations. Women were not held in the sacrament of marriage but were owned and could not be taken away. As there was little wrong doing, except causing injury to person or to matrimonial relations, the notions of penal law, if they existed at all, must have been most elementary. As there were no boundaries between civil and criminal wrongs, as we know them, there was only one remedy in either case. In cases of such disputes the Elders were anxious to make peace rather than find fault. Private vengeance was, therefore, often resorted to. In other words law, as the means of maintaining social order, relations and transactions was almost non-existant and the restrictions on property were instinctive rather than institutional.

The next stage in the development came in the wake of more control over the natural environments, and the growth of material culture, in the shape of hunting with weapons, agriculture and the rearing of domestic animals. First implements of stone, then of bronze and lastly of iron made their appearance and weapons both for hunting and defence were manufactured. The use of bones, stones, copper, bronze or iron for making ploughs and other implements for agriculture, the weaving of ropes, making of baskets marked the beginning of husbandry and the construction of thatched cottages, for shelter and living, started a life of settlement. Land was then marked out for residence and agriculture and thus began the nucleus of property proper. Even so the law protecting ownership and possession was elementary and depended upon custom rather than

recognition in fixed rules. In so far as movables were concerned they were either buried with the man who died or reverted to his immediate family. Exchanges laid the foundation of barter and even trade in kind, but that was possible only if the family was in a position to meet its needs and had a surplus. Land was so plentiful that ownership of it signified little.

At first legal notion of a group existence centred round the family which was reckoned either through the father or the mother and rarely though both. Of the first kind the joint Hindu family is the modern example and of the second the tarvad in Malabar. The best example of the third kind is the tavita in Solomon Isles. From these classifications there arose first the smallest group consisting of persons related by blood through the father or the mother. The largest group was the one in which relationship was traced from both. The first was the simplest household - the Haushalt of the Germans. Sometimes the word 'kindred' is used to denote the larger group which again is best described by the German word"grossfamilie", the big family.

The next three stages in the development, were the growth of the clan, the moiety and the tribe. The earlier groups were the result of an involuntary association in as much as a person born in a family became automatically a member. In the next stage of development involuntary and voluntary groups came into existence. These were the groups named just now. The foundations of clans were diverse. The first kind grew when primitive society developed from an endogamous to an exogamous one. The clan resulted by exogamous marriages but the common tie of a family continued. The definition of

a clan was given by a Committee[24] thus:

" An exogamous division of a tribe, the members of which are held to be related to one another by some common tie, it may be belief in descent from a common ancestor, common possession of a totem or the habitation of a common territory."

The clans were divided sometimes by a unilateral descent from a common father or from a common mother, but inter-marriages being frequent this distinction tended to disappear. However, kinship remained as the bond. The best example of a clan, descended from a common anscestor, is to be found even today in Scotland. The term 'clan' was replaced by 'gens' by Frazer[25] 'sept' by Rivers[26] and 'seb' by Lowie.[27] Rivers and Lowie borrowed their term from the German sippe (clan), while Frazer has used the French Gens (people) as the source.

A second kind of group was ordinarily based round a 'totem', an object, animal or plant to which relationship was traced. The totem might even be an image or an article manufactured by a professional priest. The best example today of such clans based on totemism is to be found in Melanesia. The third kind of clan was formed by habitation of a common territory. Often enough the idea of a common ancestor or a common totem was also involved here but this was not essential. The 'gotra' in India involving tracing the ancestry to a saint and the names such as Bharadwaja-gotra, Sandilya-gotra, amply illustrate this. Later it came to denote a sub-division of a tribe. The clan, however formed, was the second step in the growth towards a nation.

We may now pass on to the next larger group which is called a 'tribe'. This again was a simple social

group which involved not only social but political elements. Rivers defined a tribe thus:

> " a Social group of a simple kind, the members of which speak a common dialect, have a single government, and act together for such common purposes as war."[29]

We need not be overwhelmed by the role of government. Political institutions were very elementary, and consisted only of a Head-man and perhaps a Council of Elders, to deal with domestic matters and to protect the common territory against marauders. The subject of 'tribes' has received in India detailed study. But these tribes are based on occupations. The caste system and the preponderance of occupational groupings divided one tribe from another. Five important compilations made by Crooke,[30] Risley,[31] Thurston,[32] Russell[33] and Sherring[34] give us an insight into the tribes of North-west Provinces and Oudh (now Northern India), Bengal, South India and Central India. Although these studies give factual information, they are not as systematic as analogous compilations in Australia, North America and to a lesser extent Africa.

From 'tribe' to a nation was the next step. The groups enlarged when many tribes came together and formed a single community. We then get to the fringe of modern history. A detailed account here is out of the question. Professor Sallas[35] has given a detailed exposition of the matter with analogue examples from such communities as reflect the ancient societies.

This is a convenient stage at which to consider how property was viewed when the food-gatherers began to get an understanding of it. Property has many facets because at the present day the subject includes ownership,

inheritance, transfer, contracts, torts and crimes to mention only a few. As was said before, these fine distinctions were hardly understood and the development of rules was slow. Fortunately or unfortunately we have still remnants of primitive societies such as the Vedas in Ceylon, some tribes in India, and communities like the Semong and Sakai of Malay, the Andamanese, the Negritos of Phillippines and Africa, the Eskimos and so on. They are a micro-cosm of their counterparts who existed several millennia ago and thus we are enabled to study and reconstruct the pre-historic times. These peoples have stagnated in a moving world and have preserved to some extent a picture of the early man.

It has already been said that the instinctive notion of property was slowly replaced by a legal approach on the appearance of more civilized conditions in which land, animals and goods meant something. Notions of ownership of goods and chattels were stronger than those of land since goods meant an expenditure of labour and inventiveness and land on the other hand was plentiful. Comparatively speaking cattle were the most prized possessions. The awareness of ownership of land came when particular areas were appropriated for hunting or agriculture and when there was a scarcity of well-situated lands for occupation. Then came a system of land measurements and estimations of its productivity were devised. The laws concerning theft and robbery were evolved before the laws of inheritance, ejectment and transfer based on title. Taxation came in when land had to be protected and its productivity became a source of levy. Land became more important not only in laws but became the foundation of the supreme law. Private property, in the sense of belonging to an individual exclusively, was of a much later date. Everything (including houses)

was used communally and not privately. Gifts were but little understood and inheritance even less so. Mutual dependence for food and living cut across private ownership of any property except as to limited items of chattels. The others were all communal. Even in respect of cattle and some chattels, the rights of alienation was strictly limited. Although a man might regard a cow as his own, he was not at liberty to exchange her for bows and arrows, because the cow, while in his enjoyment, was still an object of communal interest. Songs and dances, which are given as examples by Diamond,[36] would hardly be recognised as material objects of special ownership or belonging. Notions of sale, mortgage, lease and pre-emption, were unknown. Land tenures did not exist because there was no orderly government. This concept belongs to the time when a feudal society developed and law began to pass into the hands of fewer and fewer persons.

In the beginning every one was equal and there were no classes. But as society grew, social orders began. The first evidence of social order emerged with the principle of private property, particularly in land. Just as we distinguish today the rich and the poor, according to their wordly possessions, in that age classes were distinguished on the basis of their possessions. The Indian distinction between one caste and another was not an economic but a social classification having its roots in the supposed dignity of certain occupational employments. That classification was not based on ownership of property but on status resulting from the exalted position in society of some occupations as compared with others. A cobbler might be rich but he was still socially

lower than an educated Brahmin. The economic classification of these times was thus entirely different from this social classification which was embraced by ownership of property. When we speak of classes, we speak of them in the economic sense and not the other.

In dealing with property in land, it is well to remember that property in land always linked political functions of a group with its social economy. When the importance of land increased, political activity increased manyfold. Thus property in land of the members of a clan or tribe had a dual meaning. While the devolution of property was from the community to the individual, the devolution was subject to the control of the community. It could then be said that it belonged simultaneously to the community and the individual either alone or in a family group. Even in the family there was always an overtone of communal interest, individual enjoyment, notwithstanding. Rivers[37] gives an illuminating instance from the New Hebrides where the exact position still obtains. The difference is made between cultivated and uncultivated lands. While all land (particularly the uncultivated portions of it) belongs to the community, the cultivated land belongs to the cultivator. When land belongs to the clan or tribe, cultivated land belongs to the kindred called the Vantimbul. Enjoyment of cultivated land is not as of right but by concession or recognition obtained from the clan or tribe. Individual ownership emerges through layers of such permissions, and depends on the wishes first of the tribe, then the clan and lastly the family. The general aspect, in a sense, is communistic. A

few more examples of group interest versus individual rights may usefully be given to show how the existence of a family and its rights gave impetus to individual-owner ownership, but not always. In our own country the joint family of Bengal, called the Dayabhaga system, made property really of the family.[38] On the other hand we had the joint family in the Mitakshara system in which individual property could be acquired without the aid of the family nucleus, thus representing a more liberal approach to private ownership. The word "Daya" meant 'inheritance' - It was either Apratbandha - the wealth of father and grand-father of which sons and grandsons became owners by reason of being so, or Saprati Bandha, obstructed wealth (See Debi Prasad v. Thakurlal I.L.R. 1 All. 105 at 112 F.B.) Lastly, in the Matriarchal System in some parts of the South, the property belonged to the tarwad[39] rather than the individual although the tarwad was itself divided into branches (Thavadi) descended through junior female member.

When clans were composed of many families, the matter was still more complicated. Land was often regarded as in the ownership of a clan but a family could, by clearing a portion of the uncultivated lands, create a kind of secondary and subordinate ownership. When such families became extinct, as often happened, the land reverted to the clan. Dr. Rivers[40] illustrates this by citing the example of the Island of Ambien where individual ownership is almost non-existent. Land is always referred to as 'our land' denoting thereby that the ownership is of the clan. In Melanesia, there is an intermediate stage. Cultivated land belongs to the Vantimbul or the family. In Fiji, however, even property owned by an individual or family can be taken by another

family or individual. As against this, communistic ideas prevail in a very pronounced manner in the Polynesian Islands.

In Africa ownership is protected politically. In the Bantu tribe the Chief holds the land and distributes it among his subjects, but he cannot sell the land except with the permission of his people. Even where land is so given, the elders of the family always have a right to take what is regarded as common usufruct. Rivers refers to the researches of Hon'ble C. Dundas[41] which reveal a case of pure individual ownership among the Wakarra, a Bantu tribe. The whole of the land is cultivated and every acre so cultivated is privately owned. The owner can sell his land but a right of pre-emption is given to his kinsmen. On the other hand Dundas[42] found that among the Akikuya, who had originally bought land from the earlier settlers, land could never be sold. The head of the group remains the owner on behalf of others. Cardinall[43] found individual ownership of land in Gold Coast, but near the Coast, land was completely communally owned. It appears, therefore, that new land broken for cultivation could not be privately owned but the community-owned land which had been long in cultivation, could be. The Chief had no rights over the land. Rivers mentions a native saying - "Chiefs command people, but not the land." Among the Aztecs of Mexico land belongs to the clan and is only allotted for cultivation.

The above examples are fairly representative of the early communities in primitive times. It is clear that the same kind of communistic sentiment prevailed in the ownership of land although by slow stages communistic ownership was on the way out and individual ownership was coming in. The communities

to which reference has been made earlier by way of illustration, furnish us an idea of the different ways in which property in land was enjoyed. It is not much to the purpose to give the evidence which exists to show resemblances between some communities existing today and those which existed several millennia before our times. In studying these communities we manage to get a glimpse into the past for they have preserved in themselves, so to speak, all that was customary in pre-historic times.

Before we go further, it may be usefully pointed out that by ownership is meant the most complete right over a thing possessed and enjoyed. An owner holds it absolutely and has full dominion over it. It is not a situation where only the possession is in one and certain reversionary rights remain outstanding in another person.

In regard to goods and chattels it is sufficient to say that some of the goods were considered as belonging to the community and a very few others were in private ownership. The weapons would be communal for in an emergency the persons were furnished weapons from the common pool. Similarly domestic animals were enjoyed in communal ownership. Private ownership attached to a very few articles which had no special communal utility.

Before we leave these primitive societies something may be said about the modes of acquisition of property. We get a great deal of light on the subject from Maine.[44] According to him ancient law was concerned not with individuals but with families. It was thus not a case, as Blackstone[45] puts it, of

an individual who "is in the occupation of a determined spot of ground for rest, for shade or the like." Maine did not enfranchise the individual who was merely regarded as continuing the existence of his fore-fathers. He even discarded the Roman classification of law between persons and things (jus personarum and jus rerum). According to him such a classification was not admissible in primitive society. Therefore, by confining our attention to property of individuals we are not likely to get a true picture. Maine gives us the example of village communities in India which are patriarchal and are in reality co-proprietorships. The British, for the first time, tried to separate the individual from the community against the old traditions. It was Roman Law which distinguished between 'a natural mode of acquisition" and 'the legal mode'. As we noticed before an animal snared or killed by the hunter, trees growing on land, deposit of soil by a river on one's own land are all natural modes of acquisition. The Justinian Code gave such property, the name res nullius and the taking of it as natural law. Bentham[46] accepted this as a natural mode and he justified the Bull of Alexander which divided undiscovered land between Spain and Portugal by a line drawn west of the Azores. By occupation, res nullius could be converted into property owned whether by an individual or by the community. Blackstone[47] sums it up in the first chapter of his book thus:

> " The Earth and all things therein were the general property of mankind from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing, nor could be extended to the use of it. For, by the law of nature and reason, he who first began to use it acquired therein

a kind of transient property that lasted so long as he was using it and no longer: or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular, yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instant he quitted the use or occupation of it, another might seize it without injustice."

Maine noticed that Blackstone further said that "when mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used." Savigny[48] analysed ownership of the substance of the thing as passing through three stages: possession, adverseness of possession and prescription. These present the true meaning of proprietorship in the largest sense we noticed shortly before. Maine attempted to reverse these stages. According to him the occupant became, from the moment of occupation, the owner, because all things were to be presumed to have had an owner and if there was no better person, then the occupant would be the owner. This inversion makes de jure possession and ownership precede de facto possession and ownership and does not adequately explain the concept of possession and ownership applicable to primitive societies. No justification exists for reversing the concepts of de facto possession and ownership and de jure possession and ownership.

The principle of occupancy of free lands finds its parallel in the Rules of International Law which were practically applied by Pope Alexander. That rule gives the right to a nation to own lands occupied for the first time. Maine also gives the example of Prize Law under which nations at war capture ships and territory etc. of their rivals and this is justified on the ground that nations at war revert to a state of nature. Sir Fredrick Pollock[49] found this to be misleading. I do not think it necessary to enlarge on these. I have set out before you the rival theories and have shown preference for the opinion of Bentham.

It may be pointed out that co-proprietorship was regarded in Roman Law as exceptional. But in India it was always a feature of family law. So strong was this sentiment of co-ownership that a son born in the family (and in places a daughter) became a co-owner by the mere fact of birth. Indeed Elphinstone[50] found that in South India even a stranger purchaser could be admitted into common ownership.

From this it will appear that communal ownership of property was the rule in primitive societies and individual ownership the exception. It is in developing societies that it gets its reversal. Even today in some parts of the world only the usufruct is divisible.[51] The tendency, however, is a progress towards individual ownership and as time passes gets more and more established.

Before leaving our study of primitive societies we may notice the advances made in legal concepts relating to property in primitive societies. There was early recognition of wrongs both to person and to property. The elders took their decisions on all

delicts, civil and criminal. In the beginning punishment could only be corporeal. Later as Marrett[52] points out, when the principle of property got sufficiently engrained ~~and~~ the nature of punishment changed, instead of corporeal punishment a system of fines known as blood-fines was introduced. Under this a person could escape corporeal punishment by parting with private property to the injured person or his next of kin. Whether it was to be an equal injury to the offender (an eye for an eye and a tooth for a tooth) or a fine for the benefit of the injured person or his kinsmen, depended on the wishes of the aggrieved. It is reasonable to think that a fine would have been considered more favourably.

In so far as injury to property was concerned, Marrett points out that there would be no stealing as there was little to steal. But communities would fight over possession of hunting grounds and fisheries or seek to protect their cultivated lands. It was only when an advance was made in the arts of creating property and some persons became rich in the conventional sense that we find stealing became an offence. For this the punishment was again either mutilation or compensation. The jurisdiction of the family then began to assert itself.

In conclusion, it may be stated that the laws were more penal than regulatory. As Maine tells us, if the land and the goods belonged to the family or clan, there was not much scope for laws. Even where they were distributed, it was within the circle. Since there was no sale and very little barter, there was no scope for the law of Contract. Law, concerned with trial of disputes, was governed by opinion of Elders rather than predetermined rules.

- - -

1. Ihring, Rudolph Von; The Spirit of Roman Law; Possession in Law.

" The individual is the starting point of his philosophy but the service of the individual must be for the benefit of the society."

Oxford Companion to Law.

2. Kocourek, Albert; Jural Relations.

3. Kelsen, Hans; General Theory of Law and State.

4. Jenks; Book of English Law (6th Edn. p.249)

5. Jurisprudence (1873) Lecture 47 pp.817-820.

6. C. Reinold Noyes; Institution of Property. (Macmillan p. 351)

7. Commentaries on the Laws of England. Introduction; Section 2, 44.

8. James Madison; Writings Vol.iv. p. 51.

9. P.J. Proudhon; Principles of Right, ch.1 Qu'est-ce que la propriété.

10. Man and Superman, (Maxims for Revolutionists) (1926) p. 233.

11. Reflections on the Revolution in France.

12. The French Revolution (1001 Gems of English Prose p.421)

13. Founder of the Bris-otins and Girondins, executed with other Girondists on 31 Oct. 1793.

14. Ancient Mythology.

15. Mary A. Nourse; A short History of the Chinese.

16. Radhakrishnan; The Principal Upanishads.

17. The date of his works is uncertain. He lived in the 8th or 10th Century B.C. His poems have been translated by Thomas Cooke.

18. Roman History (Tr. by Thirwall and Schmitz) and Lectures on the History of Rome (Tr. by Schmitz)

19. Dr. Thirwall, Bishop of St. Davids; History of Greece.
20. Grote, George, The History of Greece.
21. The Growth of Civilization p. 15.
22. Social Theory (1920) p. 12.
23. Diamond; Primitive Law, Past and Present.
24. Quoted in Hand book of Folklore (1913, p. 295) and quoted again by Dr. Rivers; Social Organisation.
25. Totemism and Exogamy (1910)
26. Rivers; Social Organisation.
27. Rivers; (ibid)
28. Diamond, (ibid p.111)
29. Rivers; (ibid).
30. Castes and Tribes of North-west Provinces and Oudh.
31. Sir H. Risley; Tribes and Castes of Bengal.
32. Castes and Tribes of South India.
33. C.R.V. Russell; The Tribes and Castes of C. Provinces of India (1916).
34. Hindu Castes and Tribes.
35. Ancient Hunters and their Modern Representatives.
36. Diamond; (ibid).
37. Rivers; (ibid).
38. Mayne; Hindu Law.
39. Mayne; (ibid).
40. Rivers; (ibid).
41. Rivers; (ibid p. 109).
42. Rivers; (ibid pp. 113, 115).
43. Rivers; (ibid p. 109).
44. Ancient Law.
45. Commentaries.

46. Fragment on Government.

47. Commentaries.

48. Law of Possession (Recht des Besitzes).

49. Possession in the German Law.

50. History of India (1905) p. 71.

51. An example is to be found in Serbia, Croatia, and Slavonika.

52. Marrett; Anthropology pp. 192, 198.

L E C T U R E II.

THE EARLY EMPIRES

L E C T U R E - II.

THE EARLY EMPIRES AND THE CODES.

We now come to a period in the history of mankind when evidence of human progress is available in varying degrees. This was the beginning of civilization. It is extremely difficult to say where civilization first took firm hold. The growth was along the great rivers of Europe, Egypt, Asia Minor, India and China. The progress from primitiveness to civilization was very similar everywhere as with growing human wants, also grew knowledge, discovery and invention. Remains of early man in Java and Heidelberg show that the Neanderthal human family went back a good fifty thousand years. For some time the Piltdown Downs in Sussex became the centre of attention. The discovery of a human skeleton at Lewes in 1912 was considered the first proof of the age of homo but in 1953-54 this was proved to be a hoax; the skull was made of human cranium with the jaw of an ape added; and both were suitably stained. However other researches establish the existence of man almost one million years ago.

There are not only great gaps in history but bigger gaps in our knowledge. The early peoples of the earth had probably no speech and thus no writing. Certain discoveries in France of Paleolithic art, which was chiefly sculptural, are dated around 40,000 B.C. They were small figurines of the female (now called 'venuses')[1]. Other art forms, found in the Lescaux Caves, of the late Megalenian period, were of 14000 - 13500 B.C. In the Neolithic period (the age of the 'Polished Stone') the artistic works show very close observation and faithful execution. This followed the Masolithic and

Megalithic eras. The latter is the age of large stones (megalitho) and the Stonehenge, in the county of Wiltshire in the middle of the Salisbury Plain is the best example. Megalithos were also used in Egypt and Malta.

These discoveries show that at least 25,000 years ago man had much advanced in intellect and craftsmanship. The Altmira cave paintings in Spain discovered by M. Santoula[2] (or rather by his little daughter who had accompanied him on the expedition) show remarkable advance in the art of painting, 17,000 years ago. However interesting these discoveries, separated by time and space, we cannot regard the authors as our immediate progenitors because races came mysteriously and disappeared equally mysteriously.

The earliest date for consideration is perhaps 2200 B.C. An Armenian tradition says that the destination of Noah's posterity was determined by Noah and the sons of Shem, Ham and Japhet got the middle earth. To the sons of Shem he gave Palestine, Syria, Assyria, Samaria, Shinar, Babylonia, Persia and Arabia; to the sons of Ham he gave Idumea, Africa, Negritis, Egypt, Nubia, Ethiopia, Scindia and India west and east of the Indus, to the sons of Japhet he gave Spain, France, Greece, Germany, Asia Minor, Circassia and Europe in general.

I do not seek to convince you about the truth or accuracy of this tradition but it is useful in one respect. The divisions of civilization followed almost the same pattern. The evidence, to which I referred, is now contained in fragments of papyri, pottery shards, inscriptions on stones, coins and paintings. There are also many codes left behind to some of which

I shall refer presently. I may, however, warn you that the record is so slender that it is not possible to refer to any full body of laws. Even the codes are in fragments. To make up for this deficiency I shall try to tell you the kind of life they led because from that can be seen how lands and movable property must have been enjoyed. I shall have to refer to rules of inheritance, contract, barter or sale and to some penal laws to show how property was protected. Beyond this evidence is not available.

Communal life seems to have got organised ahead of the family in the Neolithic Age. As communication was extremely difficult there could not have been many exchanges. We can only say that there were numerous centres or pockets of growth. It is not easy to date even approximately, the legislative or other legal activity in the world. A workable calender may be established but one cannot claim accuracy. It is now generally believed that the Sumerian Code was among the earliest, although the Egyptian Laws were probably earlier than 2050 B.C. assigned to the Sumerian Code. Some go so far as to name the same year for the Code of Hammurabi but that is an error. Among the early codes that followed, were the Assyrian Laws ascribed to 1500 B.C., the Hittite Code stated to be of 1300 to 1250 B.C. Thereafter in so far as chronology is concerned we can only mention the Draco legislation of 620 B.C. It was so strict that it has lent the name Draconian to Severe laws. These laws were finally repealed by Solon. Finally there is the Gortyn Code about 450 B.C. By that time we reach the Roman Twelve Tables also of 450 B.C. I shall speak of the Roman contribution in the next lecture.

During this time legislative activity was also visible in Egypt to be mentioned in some detail presently. The code of Li Kuei in China is of 500 B.C. although some writers say that it is of the fourth century B.C. In India Kautilya's Arthashastra is said to belong to the 4th Century B.C. and Manu's Code belongs to the first century B.C. The Egyptian, Babylonian, Sumerian and the Indian Codes will be noticed separately, some in this lecture and the others in later lectures.

If we were to go code by code, the task before us would be very great indeed. Also the narrative would be of the history and social conditions of the times rather than of law proper. It will soon be seen by us how unsatisfactory the total evidence is. Even to know something of the Sumerian Code we have to piece together fragments which go back to 2050 B.C. Sumer represented the earliest civilized country in West Asia. In the east we had China and India and in the north the Aryans who spread to different parts of the world, particularly Europe, Iran and India. Sumer represented the home of early civilization. This was the area in south Mesopotamia where in the 4th millennium B.C. there flourished the celebrated cities of Ur and Eridu. The Sumerians had found their way to Assyria, now northern Iraq and had settled down there by 3000 B.C. Their original home was perhaps the region round about the Caspian Sea and Central Asia. When they spread far and wide, it is said that they reached the Punjab where excavations show traces of Sumerian civilization.

Sumerians in Mesopotamia were more advanced than the Semitic races which were their enemies. I have mentioned their famous cities and reference to Ur is found in the Bible as the homeland of Abraham

(Genesis 11, 28), situated at the place where the Euphrates enters the Persian Gulf. Recent excavations by Sir Leonard Woolley, recorded in the Antiquity (1928) ii p. 17 show that the Sumerians were more advanced then the Egyptians and lived better. The Sumerians were the originators of writing. They had the cuneiform alphabet which was devised about 3100 B.C. They had much trade and were wealthy and even at this early period had labour organisations and advanced architecture.

The Sumerians were the victims of the Semitic races and after 2000 B.C. were slowly absorbed in Babylonia. The area under the Sumerians was later known as Mesopotamia. Babylon itself was located not far from the present city of Baghdad. It was at the spot where the Euphrates and the Tigris come close to each other and are 12 miles apart. The Semitics are said in the Bible to have descended from Shem, the eldest son of Noah. Indeed Sir Leonard Woolley claimed to have found evidence of the Flood in his excavations. The Babylonians, Assyrians left little behind. Their last king was Ashurbanipal. Some tablets about the Middle Assyrian Laws, not in any sense a code of laws, have been found. These tablets show fragments of a system of land laws but deal mainly with crimes and family. The Assyrian Code contained 20 paragraphs on land laws. The name Assyria was derived from the name of Asshur the second son of Shem and the exact site is now Northern Iraq. Before I leave the Assyrians I may mention the Eshnunna Code of which only two tablets remain and they were found near Baghdad and mention a few rules from the Babylonian Laws.

The Phoenicians occupied the areas now under Lebanon and Syria. They were the originators of the alphabet which is the ancestor of all western alphabets. The Phoenicians fell successively to Egyptian, Babylonian and Persian influences and finally Alexander the Great added their lands to his Hellenistic Empire. After him these lands formed part of the Roman Empire. Phoenicia enjoyed great splendour and even colonised northern Africa. Their Colony Carthage (now Tunisia) had a flourishing port. Not many remains of their laws are found.

Indeed to get some idea of the laws of these ancient periods we have to turn to Babylonia where evidence is much more reliable. Before turning to it, as Diamond closed this period with the celebrated King Hammurabi and his equally celebrated code, I may refer briefly to the Hittites and their code. The Hittites were an Indo-European people and appeared in Anatolia about 2000 B.C. Anatolia was later known as Asia Minor and corresponds today to the Turkish territory in Asia. The Hittites lasted till the 12th century B.C. when they fell to Phrygia. The area changed hands again and again till it became part of the Ottoman Empire in the 14th and 15th centuries A.D. We are not concerned with Phrygia, which did not last long. It is interesting to know that theirs was the legendary King Midas who had the golden touch. The Hittites had, while they lasted, conquered Syria. The Hittite society was feudal in character but upheld slavery. The Hittite Laws are on clay tablets and mention civil and criminal laws based on an elaborate system of fines. These laws are more customary than otherwise. As I said land was held on feudal service. The Hittite code is dated 1300 to 1250 B.C. It has been said that when the authority of the rulers grows, feudalism gets established. In

a later lecture I shall deal with feudalism in much detail. Under the Hittite code there were many curious provisions. Lands held in feudal tenure were inalienable, vineyards and children were unassignable. Barter was known but not sale. Sale could only be when the Phoenicians discovered the use of money. Collective responsibility of a family for wrongs fitted in with the elaborate system of fines in kind. Laws of inheritance were elaborate; restitution, not retribution, was the order of the day. A number of books have been written on Hittite Laws. Neufeld's book The Hittite Laws gives detailed information. He also refers to many earlier books. A book in French by E.Cuq entitled "Études sur le droit Babylonian, les lois Assyriènnes et les lois Hittites published in 1929, perhaps gives all the comparative details. I have tried to get hold of it but have not succeeded so far.

Diamond, as I said before, closes the account of these early codes with that of the Code of Hammurabi. But in between we have the code of Eshnunna (60 clauses) and the clay tablets of Accadian Laws and the Kirkuk Tablets (1500 B.C.) which deal mostly with family laws. I have already mentioned the Hittite Code but I leave out for the moment the Hebrew Code which we gather from the Pentateuch and the Torah (Exodus Chap. 20) in the Bible. It is from verse 21 that one get the secular laws. Sparse accounts are given in Diamond's Primitive laws in the footnotes.

All these laws were very similar in content. The early codes contained no evidence of sale of land and even in other spheres only barter is mentioned. It must be remembered that the Phoenicians had already taught the world the use of money. Laws were more punitive than regulatory and the punishments showed class consciousness and there were fines and not other

forms of punishment. The laws, such as they were, only supplied the means of restoring the disturbed vinculum juris without resort to private vengeance for private wrongs and injuries. The trials of cases are sometimes mentioned in the tablets and from them we are able to glean the procedure. Tacitus gives some inkling into the trial of criminal and civil cases. Punishment increased or decreased according as the offended person (not the accused) was of a higher or lower class or of the female sex. Something like this is also visible in the criminal laws of these early times elsewhere. Speaking of the female as the offended person, it may be mentioned that punishment was more severe if she was of child-bearing age or with child. This attitude we find persisting till the days of Alfred, the Great, and also the lex salica. Most of the injuries to person from homicide to hurt were punishable with fines and similarly damage to property. Civil wrongs, such as forcible entry on another's land, burning or felling another man's tree, stealing crops were all punished with fines. Theft, however, was sometimes punishable with death or mutilation. Litigation could be carried on by groups of kinsmen or by the individual, that is to say, the owner.

Having given a bird's eye-view of the laws, I do not propose to bore you with references to the numerous codes I have named. As the Code of Hummurabi and in a sense the Hebrew code present more details, we may view them as almost representative of legal thought in these early times, and then we shall pass on to Greece. But before I leave the ancient lands of Asia Minor and the region covered now by Iraq, Syria, Jordan and Israel which formerly contained the kingdoms of Canaan, Edom, Aram, Accad, Assyria

and Elam, I wish to say a few words about Egypt.

According to Professor Flinders Petrie,[3] the Egyptian civilization was the oldest. Others say that Babylon under Nimrod was just as old. Egypt certainly founded city states very early. It was ruled by no less than 31 dynasties till Alexander the Great added Egypt to his Empire in 332 B.C. Before that Persians and others had short periods. The first dynasty began in 3100 B.C. with the unification of Upper and Lower Egypt by King Menes. The 30th Dynasty came to an end by the death of the last King or Pharoah Nectanebo II in 343 B.C. In between we get some information about the social conditions and the laws. Personally I am quite prepared to believe that Egyptian civilization must have begun much earlier and that it perhaps began in 10000 B.C. as Professor Flinders Petrie holds.

The paucity of materials in Egypt is well stated by Diamond[4] in these words:

> " Town life had however begun in the Near East at least as early as 7000 B.C. and by about 3200 B.C. systems of writing had been evolved in Mesopotamia, Elam, Egypt and elsewhere, but from Egypt there are hardly any surviving legal records throughout the whole age of primitive law - that is, until about 700 B.C., when they begin to be plentiful."

According to Diamond, who in his turn relies entirely upon the researches of Jacques Pirenne in his Histoire des Institution et du Droit Privé de L'Ancienne Egypte (Brussels, 1932-5), it is usual to refer to Egypt as the 'old Kingdom' by which Upper Egypt is meant. This was the region where

the 31 dynasties ruled from 3200 B.C. This region included several small principalities. On the other hand Lower Egypt was represented by the Nile Delta, which as the Greek letter indicates, was triangular in shape, with a base of 150 miles and a depth of 100 miles. This was a distinctly wealthier area because of the riches showered by the river Nile. Later these two areas were combined by King Menes or Mena or Aha. In combined Egypt and earlier, the bulk of the populace, as in all primitive societies noticed by us in the earlier lecture, derived their income or sustenance from land and the society developed on feudal lines. So strong was the attachment of the tiller to the soil that the peasantry, so to speak, ran with the land, and on transfer from one feudal lord to another, passed with it. Land tenures were a highly developed system and even surveys of lands and periodical censuses were held in Lower Egypt. There were courts to try civil disputes relating to land and other property and even courts of appeal existed. There is extant a judgement of a court in the sixth dynasty and that was the high peak of civilization about 2160 B.C. The Pyramids of Gaza were then constructed about that time also. In the law of inheritance primogeniture was first invoked. All these things progressed while the king was at the head of the feudal system but systems do not last long. Between 2160 B.C. and 2000 B.C. there was confusion once again until a new dynasty arose and there was advance. The records of the period continue to be scarce. We have only a fragment of a law in the Edict of Horemheb, a penal law of the 14 century B.C. which incidentally shows

the influence of priests in the judicial system. It is curious that slaves were objects of sale in addition to land and cattle. Already the Egyptians, understood mortgage and preemption and unlike the Roman sale, which was oral in the presence of witnesses and had a ceremony which I shall describe later, writing was used for transfer of ownership and possession in Egypt.

Of the thirtyone dynasties, I have mentioned I wish to say something briefly. We have already seen that all throughout society was highly organised. The power of the nobles, who were hereditary holders of land, was broken by the rulers of the 12th dynasty (Amenemhet I 2000 B.C. to Queen Sebeknefrure, 1788 B.C. in all 8 rulers). The leading personalities were Senusret III and Amenemhet III whose statues are happily available. They had governors of the 'nomes' and they were called 'nomarchs'. They ruled urban and rural areas and also collected taxes. The king appointed judges and census lists were prepared and kept for purposes of taxation. As is often the case, the succeeding dynasty, namely, the 13th dynasty rulers were effete. The nobles threw off the royal yoke. The Turin papyrus gives names of rulers who were perhaps foreigners to the soil and were known as the Shepherd Kings. It is not clearly established if they were of Semitic or Aryan stock.

These kings covered the 15th and 16th dynasties of the Hyksos. They remained rulers of Lower Egypt but could not conquer Upper Egypt, although they were better armed. They kept up a fight till Ahmose I of the 18th dynasty threw them out and again reunited

the two Egypts. He lived from 1570 - 1546 B.C. He encouraged trade and commerce.

Egyptian civilization was based on three or four classes in addition to slaves. They were first the nobility which included officials, next the town people, the agriculturists and the priestly class. Land was generally owned by the nobility and the priests and of course the King. The agriculturists were merely the serfs and, as I said before, ran with land, no better than slaves except that they had freedom. Agriculture was the main occupation but growing of flax and weaving of linen were a source of income. Fruits and vegetables were also grown plentifully. The town dwellers were craftsmen and were excellent artificers as the numerous statues of Thutmose III, Senusret III and of course those of Queen Nefertite are evidence. The treasures found in the tombs of Tutenkhamen, especially his throne, show the excellence of conception and execution.

In the field of law and property there were ordinances to control property and testamentory and intestate succession. There were ordinances to control sale of property and contracts. Taxation was high and the administration as a consequence became corrupt. The kings were wasteful and much wealth was spent on the construction of pyramids and other monuments, large and small. It is curious that this craze was so deep-seated, that when wealth failed, old statues were redone to resemble a later king and sometimes only the inscribed name was altered. Who would be there later to check the resemblance!

Sentiment, however, had already taken a slant towards socialism. Erman in his The Literature of the Ancient Egyptians quotes the admonitions of a Prophet (Laistner; Greek History p.81) thus:

> "Nay, but the corn hath perished every where. People are stripped of clothing, perfume and oil. Every one saith: "There is no more." The store-house is bare, and he that keepeth it lieth stretched out on the ground.
>
> ... ...
>
> Behold, the rich man sleepeth thirsty. He that once begged for his dregs, now possesseth strong beer. Behold, they that possessed clothes are now in rags. He that wove not for himself, now possesses fine linen. Behold, he that never built for himself a boat now possesseth ships. He that possessed the same looketh at them, but they are no longer his."

This shows how society became topsyturvy and unrest and upheavals must have overturned the status of the rich and brought in the poor. We are not unaware of such changes in some societies even today. I shall now leave Egypt.

By far the most important of the codes of this period is that of Hammurabi. He was the sixth king in the Babylonian line which came to power after the fall of the Ur dynasty. Most of the Edicts were on stone and have thus been preserved. Also available are other laws and letters which add to our knowledge. The famous code engraved on a stone block known as stele is preserved at the Louvre in Paris. It was discovered by the French archaeologist De Morgan at Susa in ancient Elam. Others discovered Hammurabi's letters and other edicts and laws and we are thus able to piece together many things.

On one such stele is recorded Hammurabi's own statement, a translation of which is to be found in L.W. King's Letters and Inscriptions of Hammurabi (iii, 191). This was of the year 175- B.C. It reads:

> "As for the land of Sumer and Akkad, I collected the scattered peoples thereof and I procured food and drink for them. In abundance and in plenty I pastured them and I caused them to dwell in peaceful habitation."

Akkad was the capital and dynastic name of the Mesopotamian Kingdom around c.2300 B.C. The language used in the Code is Akkadian and it was first deciphered and analysed by R.F. Harper.

I have already described the position of Babylon as the tract where the Euphrates and the Tigris come to within 12 miles of each other. The kingdom of Babylonia was formed after defeating Eshnunna, Elam and Ashur. The old kingdom corresponded to what was later Mesopotamia and now is Iraq. It is perhaps one of the oldest civilizations because clay tablets show business transactions as far back as the third millennium before Christ. They are written either in Akkadian or Sumerian language. Babylonia was a mixture of Sumerians and Semitics and of these the Sumerians were more advanced. The later history of Babylonia really does not concern us but for the completion of this legal history I have extracted from books the most condensed account I could find. It is as follows:

> "One Urukagina of Lagash (c.2750 B.C.) asserted that he established the ordinances of earlier times; there survive records of administrative reforms but no general code. At Ur, Ur-Engur (c.2400 B.C.) asserted that he made justice

prevail and Ur-Nammu founder of the Sumerian third dynasty of Ur (c. 2100 B.C.) enacted a code of law of which fragments survive. There are also numerous clay tablets containing judgements, contracts, and other legal documents. There is a code in 60 clauses possibly of Bilalama, King of Eshnunna (c.1900 B.C.) in Accadian and Laws in Sumerian by Lipit-Ishtar, King of Isin (c.1900 B.C.) dealing with a variety of topics, mainly family and property."

When all Babylonia was united under one rule, Hammurabi gave his code in 1750 B.C. The code is sometimes attributed to c. 2050 B.C. but that is a mistake. The dynasty was the victim of the Hittites who killed their last king Samsuditana in c.1600 and after some anarchy Babylon was ruled by Cassites from north of Elam. A few documents survive in fragments but they give no connected account.

The code contains 282 sections. We find in it evidence of agriculture done with the help of canal systems originating in the Euphrates and the Tigris, which when the snows melt in Armenian mountains overflow their banks bringing alluvial soil. The water was also stored by the Babylonians. The code contains many rules to regulate the canals and the use of water.

The laws contain allusions to three classes: the upper, the middle and the lower classes. The upper class consisted of the landed gentry and the lowest class of slaves. The remaining class consisted of small farmers, craftsmen etc. The middle class could own property and also own slaves but it is doubtful if the slaves could own property, although Diamond would say that they could.

The Code contains a system of punishments based on retribution like the lex talionis. There are no less than 27 clauses which prescribe a death penalty. Their strict approach can be judged by one example. If a builder built a house and it fell down killing the owner, the builder was put to death. If the owner's son died, the builder's son was put to death. Death penalties were always present in all the early codes. In the Hebrew code, which will be discussed presently, it was provided that if a bull gored a man and he died the owner was spared but if the bull gored a second man the owner would be killed. It was something like the first free bite to a dog in the law of torts!

Land according to the Code ultimately belonged to the ruler but was really owned by the 'gods' and only a small part of the land could pass into private ownership. The land was tilled by slaves unless the small ownerswho had no slaves did their own tillage. Wheat, barley, spelt and dates provided the staple diet for the poor. Cattle breeding and sheep rearing was also done and wool constituted the main export. Feudalism of a sort existed because the king assigned lands on condition of military services.

The Code was found by Harper to be very carefully divided. The division according to him is this: Sections 1 - 5 contain penalties for false witnesses; Sections 6-25 mention other criminal offences; sections 26-41 regulate military service; sections 42-126 embody civil law, mainly contracts of all kinds and other allied matters; sections 127-194 contain the family law and laws of marriage and divorce; sections 195-227 name punishments of varied sorts; sections 228-277

are ordinances regulating prices, hire of labour and building operations and finally sections 278-282 deal with slaves.

In a sense the laws are not a complete code at all. There is more said about regulation of property than what were the essentials of proprietary rights. Judges were thus probably free to decide a lis on merits and the right to property was thus secured without elaborate and complicated rules. It is interesting to read here section 5 which is unique:

> "If a Judge pronounce a judgement, render a decision, deliver a verdict duly signed and sealed and afterwards alter his judgement, they shall call that judge to account for the alteration of the judgement which he had pronounced and he shall pay twelve fold the penalty which was said in the judgement, and in the assembly, they shall expel him from the seat of judgement, and he shall not return, and with the judges in a case, he shall not take his seat."

Witnesses were also severely punished for perjury. There was always a final appeal to the King. The letters of Hammurabi show that the main subjects of litigation were sales, contracts and leases.

In family law marriage was by sale and the antenuptial debts of the wife were not payable by the husband but after marriage he was liable. Private ownership of land was recognised but was subject to fixed annual dues to the King. The land owned by the king was cultivated through his officials, soldiers and craftsmen. The bond of service was not so evident in agriculture where the entities were owner, tenant or employee.

Diamond joins issue on many of Maine's statements in the latter's Ancient Law: firstly Maine's statement that "the codes were merely collections of existing customs, which were only subsequently altered first by fictions, then by equity and lastly by legislation", next, he questions the assertion of Maine that law is .derived from rules of conduct which are legal, moral and religious in nature and that 'the severance of law from morality and of religion from law belongs to a later "mental progress"'. In my studies I have found many repetitions of the same rule and it has become obvious to me that they must have had a common fundamental source. Indeed Diamond himself gives examples of such interdependence:

> "There is a mass of authority for saying that legislators copied the work of others. Ephorus says that Zaleucus adopted laws from Cretan, Spartan and Athenian sources. Plutarch tells us that the Spartan legislator Lycurgus, studied the legislation of Crete, Ionia, Egypt and perhaps Libya, Iberia and India. Herodotus says that Spartan institutions came from Crete and Charandos is said to have adopted the best from the laws of many peoples. Livy, following the fashion of the Greek historians, tells us that the Commission of Three appointed to draft the Roman Code were 'despatched to Athens to copy the famous laws of Solon and to learn the institutions, customs and laws of other Greek States. Alfred says that he collected the most just laws of the time of Ine, Offa, and Aethelberht and did not add many of his own; and in many peoples rulers commonly took

over the code of their predecessors with or without amendment."

Diamond next gives the example of the debt Hammurabi owed to Lipit-Istar of Isin, or 'a common source'. I think that Diamond fails to see that custom has always played a great part in the making of laws. In my studies I have found evidence in support of both writers. Sometimes one and sometimes the other is found to be right in the context of the history of a particular people. In fact I have prepared this lecture in such wise that the reader may reach his own conclusion as to who is right of the two and whether the truth may not lie between the two. I venture to say that this is probably so although I am more and more inclined to accept the two statements of Henry Maine. There must have been some custom at the back of such laws as found acceptance in different places and under different rulers. I cite only one instance relating to debt-slaves. The debt-slaves were those who had to serve to liquidate their debts before they were restored to freedom. Among the Hebrews this period of service was 6 years but under the code of Hammurabi this period is shown as three years. That there was a custom, common to all these countries to free a debt-slave after taking service from him for a stated period, is apparent. Therefore, a custom must have been at the root of these laws. Thus I conclude what I have to say of the code of Hammurabi. At the end of all studies I shall state the conclusion.

The Hebrews were composed of many tribes which occupied land which is now Palestine. It was the old kingdom of David (c.1010 B.C. - c. 970 B.C.) and of Solomon (c. 971 B.C. - c.930 B.C.) Later this kingdom broke into three. Israel

to the north, Judah to the south and Samaria in the centre. Both fell to other powers; Israel was conquered by Assyria in 721 B.C. and Judah by Babylonia in 587 B.C.

History begins in about 1100 B.C.when the Jews settled in Canaan. The original Canaanite laws were derived from the code of Hammurabi. There were, however, five periods in Jewish legal History. Before the Jews settled down in Canaan they followed the Semitic customs which at that time were common to all the Semitic peoples we have noticed so far. Written laws followed the Old Testament but before that the original Ten Commandments had been given to Moses on two tablets of stone.

It has been noticed by Maine that legal rules follow religious and ethical rules. This was also true of the laws of the Hebrews. The Hebrew tradition was probably older but Hebrew law really takes its roots from the Old Testament. The first five books of the Old Testament known as the Pentateuch (from Greek word which means five books) give the history of the Creation and go on to the account of the laws given by God to Moses on Mount Sinai. These are known as the Torah which in Hebrew means the laws, but the Torah includes rules of all kinds although now it is usual to use the word in connection with the law contained in the five books viz. the Genesis, the Exodus, the Leviticus, Numbers and Deuteronomy. The Hebrew Code is dated from 9th to the 7th B.C. The Hebrew Code contained additions and amendments (mainly additions) to the Pentateuch. The Biblical part really begins with the Exodus, chapter 21. The rules are terse, systematic and secular and, as laws should be expressed, are mostly in the third person singular.

In the 19th chapter of the Exodus we have the beginning of the Communion and through the other books and some more which follow the Pentateuch, God instructed the children of Israel through Moses on what they should do and what they should not do and what was the punishment for deviations. In Chapter 20 we get the Ten Commandments also called Ten Words, and then follow congeries of rules on ethics, social living, legal relationships and down to what could be eaten and what not. The ethical rules are called the Book of the Covenant and are in Exodus chapter 24. The religious code is replaced from chapter 21 by legal injunctions. Centuries later came the Mishnah, which was an early code of oral laws, perhaps the oldest. It was collected by about 450 B.C. and reached its completion by the 3rd century A.D. Later still came the commentaries which are known as the Gemara and the Mishnah and Gemara together began to be known as the Talmud. There are two Talmuds: The Palestinian and the Babylonian. They are much separated by time but differ only in respect of the Gemara.

The laws of which I shall give presently a clear account were known as the Covenant Code and we are familiar with the expression"the Ark of the Covenant", where they were kept. There were thus five stages in the legal history. In the first, life was nomadic and customs were followed as noticed already and in the second the impact of the Pentateuch was apparent. In the third period which lasted from c. 840 B.C. to c. 585 B.C. the laws which had continued to be very severe in punishment (an eye for an eye etc.) were made more rational and humane. These laws corresponded to the laws in the fifth book (Deuteronomy) taken with Joshia's reforms (c.621 B.C.) and continued to be known as the Book of the Covenant. These new rules

were the result of the teachings of the Prophets and other teachers.

In the fourth period from c.585 B.C. to c.300 B.C. the work was continued by the Scribes. They reduced the oral laws into written laws. The Leviticus contains nearly a dozen groups of laws (Chap. 17-26) and there is a Code in Ezekiel (Ch.40-48). The latter was not used as a law but as a guide. We must here distinguish between the legal parts and the Priestly Code which consisted of rules based on the three middle books of Moses, coming at different times and through a number of persons. These emerged after the fall of Jerusalem in 586 B.C.

From Chapter 21-24 of the Exodus can be gathered what the punishments for crimes were. Further rules are to be found in the 4th book of Moses called Numbers and in subsequent books Ruth and Jeremiah. From these one can easily see that the society was feudal and this is clearly noticeable in the 5th book also. These show that the family was the main unit and how tribes existed with land-owners. The lords were higher than the land-owners and they collected revenue from the landowners and paid the amount to the kings. The king and the lords had their own lands also and the bond between the king and the lords was based on military service. Writers in this period have not analysed the aspects of ownership and possession. Diamond, to whom I must own my great debt, based himself on the Old Testament (1 Sam. 14 and 1 Kings 21) to show that the king was the ultimate landowner, not only of his demesne but of all lands whether with the lord, the landowner or the tenant. The king could take away land from one and give it to another.

Property as such is not mentioned except slaves and cattle. In Chapter XII of his book which is headed the Hebrew Code, Diamond begins the narrative with the sentence "Here there is the Hebrew Code" and he prints Exodus XXI and XXII with additions and amendments made therein shown in a parallel column. Property, which is capable of transfer, includes land, cattle, garments, grain and women. The law is declared in the shape of punishments. Thus we notice the law of trover and trespass was developed and the law of bailment was very clearly understood. It was the Mishnah which means 'instruction' in Hebrew, which cleared much of the complexities of the Code.

For the trial of such cases there was a complicated judicial system but in it one can see the elements which are observed even today. The stipendary judges were appointed and paid by the king and judges even went on circuit to reach distant parts. There were in addition religious courts where special oaths, ordeal and evidence were the modes of proof. The punishments were also different.

After the fall of Jerusalem the last stage is reached. In it attempts were made to collect the decisions of judges and to reduce them to writing. The Mishnah records most of them. The process went on till 600 A.D. when the Babylonian Talmud was compiled. This is the Hebrew Code and it is also known as the Jewish Law. Today the Jewish law is applied in Israel and in other parts of the world. Jewish Personal Law is applicable to Jews. The law furnished models all over the world except India and China. Alfred the Great in England and Calvin in Scotland were influenced

and even today many of its rules are to be seen in our law of contract. This is a very short but complete account which in books gets confusing owing to details.

I now came to the laws of Greece. As you know the Greeks had a certain indifference towards laws as such. Plato in his Republic had no place for lawyers and they are conspicuous by absence of any reference to them. Indeed the lawyers argued the case more on facts and their eloquence was more decisive than legal subtleties. It was only later when Plato wrote his Laws that we get a mention of laws. The Editor of the Laws (Penguin Classics), Trevor J. Saunders, says this in the introduction:

> "The reader of the Republic who picks up the Laws is likely to have difficulty in believing that the same person wrote both."

He explained this discordance by offering the reason that with maturity Plato's views underwent a change. He quoted H.D.P. Lee (the editor of the Republic) as saying:

> "those who have read the Republic have read all the essential things Plato has to say on the subject (politics) and

further qualifies this statement by quoting from T.D. Weldon's The Vocabulary of Politics -

> "Those who want to know what Plato thought about politics would do well to study the Laws rather than the Republic."

It thus seems that Plato's views on the subject are best gathered from his Laws, although a study of all the three books is necessary to understand him. It must be remembered that Plato himself did not care for Athenian democracy and

in the Statesman and affirmed his faith in an absolute but benevolent ruler unhampered by law. He, however, qualified his remarks by saying that only a paragon could be such a person.

If we regard law primarily as an instrument of government and only secondarily as an instrument of social change, we find that the Republic described a society in which philosophers had the voice. The change from the Republic to the Statesman is best summed up by J.S. Skemp in his Plato's Statesman in these words:

> "Thus a free operation of the art of government is best, legal prescription by the expert statesman, variable at his discretion, is admirable, but where there is no such statesman the best legal codes are those which preserve the traces (Statesman c. 301 B.C.) of a philosophical statesman's insight, and any established code is to be upheld as giving a better hope of sound government than no code at all."

In the Laws Plato saw law as the supreme instrument for moral salvation of society. He was against frequent and big changes. In the Laws we get Plato's review of the two existing codes - Cretan and Spartan.

The book opens with a dialogue between an Athenian and a Spartan and as the dialogue continues, it is interesting to note that the first subject discussed is whether laws are divine in origin or human. The Athenian doubts that the codes originated with divinity.

I have prefaced this account of Greece with a discussion of Plato's views because he was the second

greatest philosopher of Greece, next only to his celebrated pupil Aristotle. Aristotle wrote 400 books on almost every branch of learning but not on law. We can only derive some assistance from his essay on Monarchy, the Customs of Barbarians and Cases on Constitutional Law. His legal philosophy is not known but his logic had much influence on legal reasoning. He did classify laws and equity but there he stopped.

There are many books on the history of ancient Greece. I have mentioned some of them in the Glossary at the end. Apart from inscriptions on stones (e.g. the Gortyn Code) and such other records we have regular histories written by historians whose names have become immortal. The writings of Manetho and Herodotus (c.484 - 425 B.C.) give us accounts of these ancient times. Manetho was an Egyptian who lived in the time of Ptolemy II Bc.308 - 246 B.C.) at Menda or Heliopolis. He was a priest and wrote a history of Egypt in Greek of which fragments have come to us. It was really Herodotus, whom Cicero surnamed 'the Father of History' who gives us the most information. How he could write books of such excellence when he was himself in exile, passes our wonder. His narrative account of the wars between Greece and Persia is in 9 volumes and the books contain a wealth of information about other matters. His historical writings cover not only Greece but also the Persians, the Medes, the Egyptians and other peoples. His style is said to be poetic and is certainly dramatic even in translations. Herodotus was oppressed by the tyrant Lydamis and went into exile to Africa, Asia and Europe. He returned and succeeded in having the tyrant expelled but went into exile again when the people did not behave. There are

excellent translations,of Larcher in French, and Reverend H. Carey's translations in English in Bohn's Classical Library.

Other sources of Greek History from early writers are Thucydides and Livy. Thucydides lived in the fifth century before Christ. Livy (Titus Livius) lived from 59 B.C. - 17 A.D. Livy was a Roman Historian but he wrote the history of the times from the foundation of Rome in the 9th century B.C. to the 4th century A.D. He wrote in all 142 books but only 35 have survived.

Thucydides lived in the same age as Herodotus. There was only a difference of 25 years between them and they were contemporaries. Therefore their accounts are capable of being checked inter-se. According to Thucydides, the population was nomadic but it settled down in a pastoral age when agriculture became the real mode of life. Then grew clans and tribes and other typical primitive organisations. Greece was thus no exception.[4] The Mycenaen civilization was the Bronze Age and developed after 1650 B.C. By 1200 B.C. city states had been established. The want of sufficient cultivable lands led to colonial expansion. In later years the entire Mediterranean littoral passed to the Greeks but the cities remained the units of political power. This power was first exercised by monarch, next by aristocracy and lastly by an oligarchy. Till the eighth century B.C. power remained in the hands of the landowners.

The establishment of oligarchies based on wealth was the downfall of aristocracies which had earlier destroyed monarchies. The next step was the introduction of democracy. Aristotle in his Politics[5] says:

"For the real difference between democracy and

oligarchy is poverty and wealth. Wherever men rule by reason of their wealth, whether they be few or many, that is an oligarchy and where the poor rule, that is democracy. But as a fact the rich are few and the poor many, for a few are well-to-do, whereas freedom is enjoyed by all, and wealth and freedom are the grounds on which the oligarchic and democratic parties respectively claim power in the State."

This clearly establishes how property was the source of political power before the large numbers of the poor began to dominate the scene. Of the city states the most important was Sparta, the Capital of Laconia. When Sparta controlled Laconia, the indigenous people were reduced to the condition of serfs or semi-independent half-citizens. They were known as Periokoi but were subject to the ruling class of Spartans, who did not number more than a tenth of the total population. However the Spartans had a short-lived glory. First the Thebans defeated them and then the Visigoths completed their downfall by 396 A.D,

It is usual to study Sparta as representative of the city states of Ancient Greece. Serfdom existed freely everywhere but the serfs were composed of the conquered populations. Between the ruling classes, the other citizen and the serfs were the perioikoi, who were not slaves, but had no political power. They were the businessmen, and trade and commerce were mainly in their hands. The helot (serfs), that is the indigenous population, were virtually slaves and their status was severely limited. They had lost their freedom, their lands also. The farming

communities of Messenia and Laconia had no political power. They were answerable for military service and the society that emerged was really a 'communist military state'. Each child born was inspected and only the fit were allowed to live and after the age of seven, the education and upbringing of the male children was the concern of the state. They were trained physically and militarily and their military responsibility continued till the age of sixty. Monarchy itself was dual and hereditary. The king's powers were limited by associating the magistrati with him.

The Council of Elders elected by the citizens had an age qualification of 60 years. The Assembly of citizens called the appella met every month to hear about the working of the Council, Gerusia. They also decided important questions of succession, war and peace.

The constitutional position is apparent from the laws of Gortyn and they refer to an earlier code. The earlier code was perhaps the Draco Legislation (c.620 B.C.) Draco was an Athenian law-giver, who prepared his code with fixed penalties. He merely reduced the customary law to writing in one place and it thus became the first comprehensive record of Athenian Laws. The penalties were very harsh. It was Solon who in 590 B.C. abolished Draco's laws except the law on homicide. The early Greek constitution attributed to Solon is doubted as not genuine. Solon's name is remembered because he ended serfdom and made the laws humane. In his time any citizen could bring a suit, not only the aggrieved person. Although Greece did not deem law to be fit for study the reforms of Solon remained the basis of future laws.

The Gortyn Code is preserved because it was inscribed on the wall of a theatre at Gortyn in southern Crete. Its date is about 450 B.C. which is the date of the Roman Twelve Tables also. It refers to older Greek laws. In itself it deals only with Civil Law. The older laws are of Zaleucus at Locri (c.650 B.C.) and of Charondos at Catana (c. 500 B.C.).

Class struggle was not unknown. In a fragment which has come down to us Solon says:

> "The people's chiefs, are rich by trusting to deeds of injustice, and they steal and rob from this source and that, sparing neither the treasure of the gods nor of the state."[6]

Therefore, in many places the ruling clans were driven out but dictators took their place.

Much of the later information comes from Aristotle's Constitution of Athens. From it we notice the changes. First monarchy became elective and the term was reduced to one year. The King's powers were also made less and in the end the power went to the hands of the Magistrates. The land was in the hands of the few rich and the general populace worked on it on conditions of payment of tithe. It was really 1/6th. If they did not pay the tithe, their children were sold in slavery. The people continued to be divided on the basis of wealth. It was Solon who undid most of the hardships. In another fragment[7] he says:

> "As for me, regarding the objects for which I brought the people together, you ask why I stopped before I had achieved these objects? To those most excellent measures the great

mother of the Olympian gods, black Earth, shall in the just fulness of time bear witness, even she whom once I freed from the boundary stones that encumbered her all about. She who before was enslaved is now free. To Athens, our divinely founded country, I restored many who had been sold, some unjustly, some according to law, and others who through hard necessity were in exile, who no longer spoke the Attic tongue, as would befall me wandering far afield. Then those who suffered cruel slavery here on the spot, trembling at their master's ways, I liberated. These things I performed by the might of law, joining together force and right, and I fulfilled my promise."

Solon stopped debt-slavery. He changed the classes by altering the three class citizen body by separating the wealthiest from the rest. He gave a judicial system in which juries acted with authority and introduced a system of appeals. No wonder he is known by the soubriquet "the first champion of the people". When in 594 B.C. he introduced his reforms called Seisachtheia (shaking of burdens), the serfs became tenants, and they could not be sold as slaves for non-payment of debts. People divided on the basis of their returns had privileges in proportion.

After Solon came Peisistratus and he furthered the reforms. The tithe was reduced, confiscated lands were given to small free-hold farmers and advances for cultivation were given. The economy had passed the household unit and with the introduction of money trade and commerce flourished.

If we look at Athens we are surprised how many of the actions which are the staple promises in party manifestoes were fully current then. Taxes were

introduced, foreign currency was checked, and foreign participation was prohibited, distinction between public and private sector was understood. Public works were entrusted to private entrerprise, cottage industries flourished and direct taxes except the head-tax did not exist. There were protective tariffs and banks advanced money and even negotiable instruments were known.

I shall now summarize the kind of legal provisions which were evident then. It will have been noticed that there is a great resemblance between the customs, laws and practices of these very different peoples. It is convenient to begin with Plato's Laws. In book V we get the ideas of distribution of land. He says:

> "Ideal Society and State is when friend's property is genuinely shared - In such a State the notion of 'private property' will have been by hook or by crook completely eliminated from life. Every thing possible will have been done to throw into a sort of common pool even what is by nature 'my own' like eyes and ears and hands, in the sense that to judge by appearances they all see and hear and act in concert. Every body feels pleasure and pain at the same things, so that all praise and blame with complete unanimity. To sum up, the laws in force impose the greatest possible unity on the State - and you'll never produce a better or true criterion of our absolutely perfect law than that ....."

Talking of distribution of land, Plato says:

> ".... but the distribution should be made with some such intention as this: each man who

receives a portion of land should regard it as the common possession of the entire State."

These are highly communistic ideas, propounded over two and quarter millennia ago. Although Plato advocated four property classes, his ideas were applicable to whosoever held land. Sometimes it is difficult to see whether he spoke for himself or for the Athenian or the Spartan. However in Book 6 he advocated registration of lands and he also said that holdings should be inalienable on pain of penalties.

The use of punishments rather than regulation of property was the main aspect of ancient laws. Land was always considered to belong to the King and in religious literature it was treated as belonging to a god. However tenures had made appearance and market in lands also grew. Sale, lease, and exchange of land and other properties were known. Goods which included cattle and slaves could be sold and in Babylonia even ships were subject of transfer. In the value of goods, barter, loans, bailment and deposit were understood. In this respect the Gortyn law code went much further. It included references to private and family property. It was the first to distinguish between the two kinds of property in matters of inheritance. Real estate and cattle went to sons and the remaining property was divided between sons and daughters, a son receiving twice as much as a daughter. Woman's property did not pass to the husband. He could use it but could not dispose of it.

This then was the material from which have grown our own notions of property. The Romans built upon it further and we shall see in the next lecture what their contribution was.

- - -

1. Gina Pischell; The Golden History of Art.
2. Davis; Outline History of the World and Gina Pischell; The Golden History of Art.
3. Flinders Petrie, Sir William Mathews (1853-1942): In 1880 he went to Egypt and excavated extensively before he went to Palestine in 1926. From 1892 - 1933 he was professor of Egyptology at the University College, London.
4. Grote; History of Greece (Everyman).
5. Aristotle; Politics (Everyman, Jowitt's Translation p. 80.)
6. Fragment 4.
7. Fragment 32.

...

LECTURE III

THE CONTRIBUTION OF THE ROMANS

L E C T U R E III

THE CONTRIBUTION OF THE ROMANS

No single influence in the field of law, speaking generally, can equal the impact of Roman Law, particularly in Europe. Although the Hellenic and Germanic laws, among others, had influence, it was not so great after the emergence of Roman Law. In a sense Roman Law systematized legal principles and its influence is felt even today. Ihring reminded his readers that Rome had thrice conquered the world: first by arms, secondly by religion and lastly by law. Although the study of Roman Law has fallen into desuetude, no scholar can ignore it because for a complete understanding of legal principles one requires an intimate knowledge of the basic concepts determined by the Roman jurists.. In this lecture I intend taking you briefly into the evolution of Roman Law before telling you how the Romans viewed property and how they systematized the basic concepts.

When we think of Roman Law, we are too apt to begin with the corpus juris civilis, which expression describes compendiously the compilations made in Justinian's time, about the middle of the first millennium after Christ. Roman Laws and history, however go back more than a thousand years before Justinian. From the foundation of Rome (circa 753 B.C.) or the inauguration of the Republic in 509 B.C. to the publication of Justinian's Codex in 529 A.D. we pass through a succession of laws by many law givers, and many Codes. From the

Lex Valeria (508 B.C.) to the Codex there were no less than 28 leges in the Republic and before that in the Regal Period laws were made by the Comitia Curiata and the Comitia Centuriata resulting finally in the Jus Papirianum. Later in the Empire beginning in 30 B.C. we get again no less than 19 leges and three important codes. Most of these codes have been lost.

Ihring's statement[2] 'History like Nature, does not make leaps' is also true of Roman Law. Maine in the opening sentence of his classic[3] says:

> "The most celebrated system of jurisprudence known to the world begins as it ends with a code."

His thesis was that the codes of Justinian, as indeed all intermediate codes before it in Rome, rested on the Twelve Tables, a piece of legislation passed by the Comitia Centuriata in 451 - 448 B.C. According to Buckland,[4] the Twelve Tables, like the laws of the Medes and the Persians were at first thought to be immutable. This was not because there was anything divine about these laws. They were considered above change because no higher authority existed. In Indo-European communities laws were often regarded as the utterances of a king or a seer, inspired by a Deity. In Greece the Homeric Poems are the repositories and evidence of the Themistes, the archaic forms of legal ideas. They were supposed to be of divine origin. In India, to Manu and his divine personality are attributed the laws which were not only compiled by him or in his time, but also to laws compiled by others after his time.

In an excursus to the first chapter of Ancient Law Sir Fredrick Pollock examined the thesis

of Maine and fully endorsed it. However, inspite of the supposed immutability of the Twelve Tables, it was not long, before they were changed, if it was found necessary, and they never enjoyed a divine attribute. Indeed, according to Gaius the sources of Roman Law were three: (i) Statutes: that is to say Leges, Plebiscita, Senatus Consulta, Imperial Constributions; (ii) Laws made by delegated authorities such as the Edicts of Magistrates and (iii) the Rèsponsa Prudentium. These terms I shall explain presently. To these Justinian added Usus or Custom. Another source, commonly considered adequate, as such, was the Interpretatio, the exegis upon laws by the Pontiffs, Jurists and Praetors.

At first, no body of men was so supreme that its actions and determinations could only be undone by itself and by no other body of men. In England Parliament achieved this omnicompetence by the end of the seventeenth century, a position which our Parliament, after some vicissitudes, has achieved recently but for the present only in its power of amending the constitution in some respects.

Leage[5] quotes Bagehot who said that for a society to win the struggle for existence two things were necessary - a legal fibre (jus strictum), that is to say, some set rules to give it cohesion and strength and next, a method by which such rules may be reformed. The Twelve Tables were the former and the rest of the development of the law was merely a remodelling. Thus Roman Law was never rigid. Indeed the rigour of the law was tempered by the interpretations of the Pontiffs, Jurists and Praetors.

To understand property as understood in Roman Laws, I shall first invite a brief reference

to the nature of Roman Society and the State. Roman Society at first was divided into two distinct bodies, the _populus_ and the _plebs_. The former possessed political power and had better rights. The _populus_ consisted of three tribes, each tribe of ten _curaiae_ and each _curia_ of ten _gens_ and each _gen ten familia_. Each family had a common name and common religious rites. The _gens_ were supposed to be descended from a common ancestor.[6] Thus it will be seen that Roman Society developed from the kind of primitive society which we considered in the first lecture.

The _gentes_ met in the great Council called the _Comitia Curiata_. A smaller body, the Senate, initiated matters to be considered therein. A king nominated by the Senate and elected by the Council, presided over the whole body and was the chief executive. The _plebs_ were, probably, the local population of conquered towns, the freed slaves and settlers from outside. They had no place in the _gentes_ or the _Comitia Curiata_. This division of people into two was also reflected in matters concerning property. There were separate scales of property which could be owned by the _populus_ and the _plebs._ None except a citizen had the peculiar ownership termed _dominion ex jure Quiritium_. This was known as _Quiritary_ property. It had its special attributes and even the mode of transfer was different. The Praetors, however, changed this conception and made laws more uniform. As Sanders Says:[7] "When justice and reason pronounced a stranger to be an owner, it was impossible for a _Praetor_ not to recognise an ownership different from that which a citizen would claim." The _Praetors_ were helped in this by men who studied law for the benefit of

friends and others and were known as juris Consulti or juris Prudentes. Such men gave answers to questions when asked, for interpreting the Twelve Tables and other laws. When answers given to the Praetors were accepted by them, they became a source of law known as Responsa Prudentium. Such practice was not unique to Rome. It has been known in other parts of the world. Indeed in India, it was usual to refer difficult question to Pundits and Muftis and their answers became a source of law.

The Comitia Curiata was a body consisting of heads of families (patres familiae) grouped in 30 Curias which voted as a block. The Comitia Centuriata was an assembly of adult male citizens, partricians and plebians. Voting here was by centuria, a military division. The criterion was the wealth of the member and plebians thus had little voting power. The Centuria elected the magistrati (magistrates). There was also a Comitia Tributa, an assembly constituted by tribus (an administrative unit). Its membership grew in time from 4 to 35, as more and more districts were formed. It passed some laws of political and constitutional character but had little impact on private law. It consisted of civis and plebs but laws were applicable to civis and were differently worded for the Plebs. The Senatus Consulta was a consultative body like the Privy Council to advise the Rex (King) and later the Magistrati (Magistrates). This body did not legislate. There were other sources of laws such as Mandata, Edicta Principis Decreta etc., but they need not trouble us.

What Justinian did was to assimilate all such laws together in his Codex based on the earlier code of Theodosius.[8] Theodosius II was an emperor only in name, the sovereignty was exercised by his sister Pulcheria, but his name was given to the Code. Justinian Codex was compiled by ten jurists who worked for two years. All imperial Constitutions and all earlier codes were abolished after the Codex was promulgated. Immediately afterwards Justinian commissioned Tribonian, one of the most prominent of the Commissionairs, to perform the task of compiling a complete survey of laws from all earlier materials. Tribonian was assisted by sixteen collaborators. No less than fifty books were compiled by them which went under the name of Digesta or Pandectae. According to Sanders[9] the Digest was influenced by the writings of 39 jurists but half the work was based upon the writings of Ulpian[10] and Paul.[11]

The complexities of the Codex and the Digesta prompted Justinian to have a simpler and more condensed compilation for daily use and instruction. Tribonian achieved this with the assistance of Theophilus[12] and Dorotheus, professors at Constantinople and Barytus respectively. The last of Justinian's compilations was a book of 50 decisions and Tribonian incorporated them in a revised Code called the Repetitae Praelectiones (534 A.D.). When this code was promulgated the earlier Codex was suppressed. Justinian's still later reforms took place through his Novellae Constitutiones. It is these compilations which are compendiously known as Corpus Juris Civilis. Justinian's work continued its influence for many

years to come chiefly through the school at Bologna where Commentators (known as Glossators) were constantly modernising laws in the light of further study and in the changing circumstances. It is from this body of laws that we glean the Roman contribution, but confining ourselves, in this study, to the Institutes, because of the Twelve Tables only fragments remain. From what is available it is difficult to say what the sources were but the main debt seems to be to Solon.[13] The Fifth Table (inheritance) the Sixth Table (ownership) and the Seventh Table (buildings and plots of land) alone concern property. The fragments contain short points of decided cases.

It may be pointed out that when the institution of Centuria grew, the Comitia Curiata gave place to the Comitia Centuriate, and it was the latter which made the laws. The King could also make laws as the head of the State, and he was also the Supreme Judge although in Criminal cases, particularly those involving a death penalty, an appeal lay from him to the Comitia Curiata.

However, a plebian had no such right of appeal. Later, the plebs formed a part of the Comitia Centuriata after the kings were expelled. Civil cases were decided by the king as the Pontific maximus and other Pontifices acted as judges under his authority. This short account should suffice as a background to our study of the laws of the Romans pertaining to property. For detailed study Girard,[14] Roby,[15] Buckland[16] and Muirhead[17] may be consulted.

The Institutes of Justinian considered private law under three main headings. They were: (i) the law relating to persons (ii) the law relating to things and (iii) the law relating to actions. Sanders[18] considered that this was hardly accurate

or exhaustive and added:

> "It is their great merit, the real source of their value to modern Europe, that they apprehended and elucidated the great leading principles and notions of general jurisprudence.."

The Institutes collected these principles from old customary law or jus civile, the opinions of jurists, and enactments. Dividing rights and corresponding obligations in relation to property they made the following classifications:

Rights

In rem		In personam	
Personal	Proprietary	Contract	Tort

A right in rem was available against the world. In the realm of persons, it meant guarantees to liberty of persons and in the realm of property it meant guarantees against invasion of proprietary enjoyment.

As property is of several kinds, the Romans first divided property into two kinds: Corporeal and Incorporeal which the Romans designated respectively by the expressions tangi possunt and tangi non possunt from which came the expressions tangible property and intangible property. A house is tangible, that is visible and capable of physical possession and is therefore corporeal. The right to live in it is intangible and therefore incorporeal. Next they divided corporeal property into movables and immovables Land and buildings fixed permanently to the soil are immovable corporeal property. As distinguished from immovable corporeal property, movable corporeal property can be moved. Goods are the obvious examples. Tangibles are next divided into those that can be physically divided and those that cannot. Land is divisible but a horse is not.

In contrast incorporeal property is an abstraction. The right in a tangible corporeal property when treated as a right by itself is an abstraction and, therefore, intangible. Some incorporeal properties (such as actionable claims negotiable instruments etc.) are the result of modern complicated legal transactions between man and man. The list of such incorporeal properties keeps on growing as more and more categories are added.

Then we have the objects of principal rights and objects of accessory rights. A tree is the object of the former right and the fruit of the tree the object of the latter right. There were other classifications also such as things viewed as genus or species or viewed individually or collectively. Such further classifications were based upon the nature of the things considered.

Things were next divided on the basis of dominium (ownership). From this arose distinctions in which we are interested. Things in common enjoyment were known as Res communes. They were things which every individual could enjoy but which no one could own. Air, flowing water, etc., are enjoyed by all but no one can own them. Then there were things which were considered the property of the State. They were known as Res publicae. Things vesting in corporate bodies were known as Res universitatis. Buckland, to whose admirable analysis I owe the information, gives examples of stadiums and theatres. Then there was a group of four kinds of properties which were not or could

not be claimed in ownership by any one. Res nullius were things which were not claimed in ownership by any one, such as wild animals or things abandoned by the former owner. Buckland includes in Res nullius certain properties which could not be made the objects of private ownership. First among these were Res sacrae like temples, churches and what they contained. Res sacrae were regarded as the properties of the superior deities (Di Superi). Res sacrae could not be sold or commercially dealt with, but Justinian allowed their sale to redeem captives. Res religiosae were dedicated to inferior deities (Di manes). Finally, there were Res sanctae such as city walls and gates. The above properties were beyond private ownership and were known as res extra patrimonium. The rest were known as res in patrimonium.

In so far as land was concerned, a particular distinction was made at first whether it was solum Italicum or solum provinciale. This distinction was based on the location of the land and the way in which it was acquired by the State. Ownership of these two kinds of lands was differently acquired and they fell in another classification between res mancipi and res nec mancipi which I shall explain presently. Ager Romanus was the land in the original territory of the State and this alone was regarded as capable of sale through the procedure of manicipatio which distinguished res mancipi and res nec mancipi. Such land was held under a special ownership known compendiously as ex jure Quiritium. The provincial territories were not subject to such tenure. They also belonged to the State but ownership by private persons was not possible. The procedure of manicipatio

was not applicable. According to Sanders this distinction was abolished by Justinian although it had probably disappeared by 285 A.D. in the time of Diocletian.

The distinction between _res mancipi_ and _res nec mancipi_ depended upon the applicability of a special mode of conveyance of rights by the owner. This procedure was called _mancipatio_. The procedure was so peculiar that a word may be said about it, and also about another mode of conveyance, known as _in jure cessio_. _Mancipatio_ was a kind of fictitious sale requiring the presence of a person holding a balance (_libripens_), a stated number of citizens as witnesses and the parties to a transfer. Now if a horse or a slave or even land was to be transferred, the transferee took the thing (_res_) in one hand and a piece of metal (_ace_) in the other. When land was involved a piece of the soil represented the land. He then recited before the _libripens_ and the witnesses and the transferor, the formula:

> "_Hunc ego hominem (hominem_ if a slave but _res_, if a thing) _ex jure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneague libra_."
>
> (The first part "asserts the acquirer's ownership according to civil law; the second justified the claim by a declaration of purchase in due form") (Leage)[9]

He then struck the balance with the metal and handed it over to the transferor who accepted it and kept silent. The price of metal really represented the price or consideration which might be different. It was only necessary to mention what it was and the receipt of the metal betokened receipt of the considera-
tion. Such a fictitious sale was sufficient to

transfer ownership, whether by sale or otherwise, of both movables and immovables. Indeed it was carried so far that emancipation of slaves and adoptions were similarly carried out with suitable changes in the formula. Mancipatio was completed by traditio i.e. by delivery of the object of transfer. In course of time traditio became more important than the ceremony. Mancipatio had its beginnings in the sixth of the Twelve Tables. At first Ager Romanes was alone subject to Mancipatio but later the distinction between Ager Romanes and Solum Italicum disappeared and mancipatio began to apply to both.

In mancipatio a distinction was made between citizens and foreigners (perigrini). Land and things held by perigrini were known as peregrina. Leage[19] has described the status of perigrini in these words:

> "The jus civile of Rome was regarded as the exclusive privilege of Roman citizens, and no one but a citizen could claim its protection. A perigrinus, accordingly, had no sort of legal status. If, for example, he wished to purchase cattle, he could, as a fact, agree to buy them, pay the price and take the cattle home; but the cattle would not be his, and the late owner could successfully reclaim them; since the only method by which the legal title could be acquired was going through certain forms (a mancipatio or and 'in jure cessio') to which a foreigner could by no possibility be a party."

This was later modified by the Praetors as I have stated earlier. A special Praetor Peregrinus was appointed. Sir Henry Maine[20] places this about the First Punic War but Leage gives the exact date as 242 B.C. The Praetor paid more attention to 'traditio'

than to the ceremony although according to Leage, Sir Henry Maine attributed the advance of the law by the Praetors to their desire to harmonise all laws for all the peoples. The opinion of Sir Henry Maine has found critics, particularly Dr.Moyle and even Leage did not accept it. We need not enter into the controversy.

Of the other mode of transfer known as 'in jure cassio' a word may be said. While mancipatio was a fictitious sale, this was a fictitious or friendly action. In this transfer the parties appeared before a Magistrate with the thing and the formula of mancipatio was gone through minus the reference to the balance and the libripens. The transferor would then be questioned by the Magistrate and if he did not deny the transfer and merely kept silent, the Magistrate made his order and the transfer was complete.

The concept of property in Roman Law rested on the classification of property from different angles, the modes of transfer, the modes of acquisition and inheritance. I have already described the first two. Although property rights were understood either as full ownership or rights in other person's property (jura in re aliena), both these rights were known as res (things). The Romans were thus behind us in their concepts. Property rights were really not treated from the point of view of rights versus obligations as we do. While their treatment comprised contracts, delicts, quasi-contracts and quasi-delicts as we continue to understand them, personal rights and obligations were only barely understood. Res to the Romans meant equally full ownership and rights in other persons' properties which they called servitudes.

There was no such detailed division of 'things' as we find in Freund[23] (to whom 'thing' was only a method of thinking), a classification too detailed to discuss here.

How property came to be acquired was the subject of detailed classification. It depended on the way ownership emerged. The first mode was occupation of something of which there was no owner, such as derelicta (abandoned), things taken from an enemy, insula nata (new island) and treasure trove. The next mode was accessio (increase). Examples of these are furnished by insula lata (increase in size of islands) alvenus derelictus (river changing its course), avulsio (land and trees washed away and trees taking root on a stranger's land) confusi (the mixing of liquids), commexio (the mixing of solids). Then there was the mode in aedificatio: Examples were - A using B's materials to build on his own land or A with his own materials building on B's land. In the first case A had to pay twice the price as damages and in the second case B became the owner. Other examples are of plantatio (planting on land) and satio (sowing on land), scriptura (writing on another's material) and pictura (painting on canvass belonging to another).

There was a difference between the Sabinians and Proculians as to ownership of things when specificatio (a new res formed from another res) took place. If A made a thing with B's material, to whom did the thing belong? The Sabinians thought it belonged to A and the Proculians to B. Justinian solved the problem by choosing a middle line. If the material could be restored to its original shape or form then it belonged to the owner of the material,

if not the owner thereof had to be compensated. A mode of acquisition went under the name of fructum perceptio, for example the fruits of trees and offsprings of animals belonged to the owner of the tree or the animal. The Bible had already solved this problem. Lastly, there was traditio of which something has already been said.

Justinian systematised the law on the subject and made it simpler. To the two modes of transfer mancipatio and in jure cessio (already made simpler by him), he added usucapio (long possession with conditions we base prescription on), Donatio (gifts) acquisition by lege (statutes) and acquisition by adjudicatio (award of judge). Some things could not be subject of usucapio at all, such as things stolen or taken by violence. But if C lent or deposited a thing with B and B died and D the heirs gave it to A, A could usucapt.

The Romans considered ownership as exclusive. The only limitation was summed up in their maxim 'Sic utere tuo ut alienum non laedas (so use your own rights that you do not hurt those of another). Short of this, ownership was described as ius utendi, fruendi, abutendi which meant the right to full enjoyment including the right to destroy and transfer. This transfer, as we have seen above, often involved a formality which appears strange to our eyes but was essential if ownership was to be completely destroyed. The lack of formality leaving the husk of ownership, could be made up by usucapio (long lapse of time). But till then the ownership remained divided - the ownership in bonis (bonitary ownership) being in one and the legal ownership (dominium) in the previous owner, suggesting the distinction made between legal ownership and equitable ownership such as we recognise in trust and even benami

transactions. Added to these modes of acquisition were Donatio, Leges and Adjudicatio. Donatio was not really a mode of acquisition proper although Justinian treated it as such but Gaius did not. Dr. Moyle[25] thought that Donatio could take the form of a release as from a debt. Donatio had many forms also. A gift in contemplation of death Donatio mortis causa was regarded very seriously and required no less than five witnesses but Donatio inter vivos was less formal, the only condition being traditio (transfer) coupled with registration, if the value was more than 500 solidi. Lege was title conferred by law and Adjudicatio was title conferred by a decree. Here too there was no real acquisition.

As to possession, between the subjective theory of Savigny in which possession meant the actual control of the thing (corpus) coupled with the intention (animus) to hold and the objective theory of Ihring where the animus is only the awareness in the possessor, the several classifications made by Romans stand explained. It is thus that the Romans applied to the posse-ssion of right as opposed to the object itself the terms 'possession in law' (possessio juris) and quasi-possessio and spoke of acts of detention necessary in both directions. These are complica-ted matters which we need not consider here.

The difficulty arises from the fact there is really no adequate definition of possession. This was pointed out by Harris[25] on the authority of Earl Jowitt in U.S.A. v. Dolfus Mieg (1952) A.C. 582 at 65 and Prof. Hart's opinion (1954) 70 L.Q.R. 37. A description of possession as Prof. Hart says,

of the rules in relation to the kind of object,, the kind of right and the kind of person will take us too far afield. Thus it is that the possession of a master is different from the possession of his servant although the object may be same, and the possession by the endorsee of negotiable instrument and the possession of the same instrument by a holder in due course, are different. Harris has given these and many other examples. Our notions of ownership and possession are much in advance of the Romans. They had not developed the modern rules which govern patents and copyrights. These are such complicated matters which need not and indeed, cannot be discussed here.

Thus was property classified and re-classified by the Romans and the Law concerning each class developed.

- - -

1. Ihring, Rudolph von; Geist des Romanishen Rechts (The Spirit of Roman Law)

2. Gesist; I p. 209.

3. Ancient Law.

4. A Manual of Roman Law.

5. Roman Law p. 20.

6. Cicero, Topic 20

7. Sanders, The Institutes of Justinian (Introduction).

8. Sanders, (ibid).

9. Sanders, (ibid).

10. Domitus Ulpianus, Minister to Emperor Alexander Severus and elevated to praetorship by him. His strict justice led to his being murdered by the Praetorian soldiers under the very eyes of the Emperor.

11. Paulus, Julius (c.200 A.D.) Assessor to Papinian. He wrote a commentary on the Edict in 80 books and an exposition of Jus Civile in 16 books.

12. He left also an excellent paraphrase in Greek which was discovered in the 16th century at Louvain, a town in Central Belgium.

13. For an account of Solon's laws see, Thviwall's History of Greece.

14. Manuel Elémentaire de droit Romain, Mélange de droit Romain.

15. Roby.

16. A Manual of Roman Law.

17. Historical Introduction to Private Law of Rome.

18. Institutes of Justinian (Introduction).

19. Roman Law.

20. Mayne, Ancient Law.

21. Mayne; (ibid).

22. Imperatoris Justinian Institutione (4th Edn.)

23. Quoted in Noyes, Institution of Property p.178 f.n.

24. See no.22. p.232.

25. Concept of Possession in English Law (Oxford) ed. Guest.

L E C T U R E IV

F E U D A L I S M

L E C T U R E IV

F E U D A L I S M

Laws, such as they were in Europe, had a chequered career. Roman Law was the most outstanding of them all. By the year 200 A.D. its influence had reached its zenith owing to the efforts of Ulpianus, but afterwards it began to decline. According to Pollock and Maitland[1] a kind of sterility prevailed till we reach the age of Justinian, who began his work about the year 528 A.D. and completed it in six years. His most important work, the Digest, remained almost lost till its application in Rome about 554 A.D. Even so the true revival of Roman Law really began in the 11th Century.

During the intervening period there was a succession of Codes, laws, and edicts of German, French and Roman origins. To speak of them at length would make us stray too far. The earliest of them, Codex Gregorianus and Codex Harmogenianus have perished. Both were compiled in the East at Beyrouth about 291 and 295 A.D. The Theodosian Code (438 A.D.) compiled by Valentenian III, who reigned in West Germany or by Theodosium II, has survived but there is no perfect copy available. It was divided into 16 books and contained all laws from the days of Constantine. It was compiled at Constantinople and was edited by Mommsen and Mayer. The West Goths had the Law of Euric, King of Visigoths (470-475). It influenced later Roman Codes. The Lex Salica, the best known of personal laws of the Germans

and the oldest Code, followed soon after. It influenced France, Low Countries and England. The Lex Reburia was before 596 A.D. and the Lex Burgundionum came at the end of the 5th Century. The latter had two branches - Lex Romana Burgundionum (565 A.D.) and the Lex Visigothorum (506 A,D.). They comprised laws taken from other Codes particularly the laws of Paulus, Papinian and Gaius. Their value was enhanced by the inclusion of an Interpretatio and a summary. Indeed the summary was more understood and became the model for later laws. The Edictum Theodorici (493-526) and the Collectio Dionysiana issued by the Popes between 384 and 498 A.D. became mainly a body of Canon Law. In 643 A.D. came the Edicts of Rothari in Lombardy which were incidentally the best compilation of Germanic usages. It was in 388 Chapters and comprised criminal laws, family law, property law, procedure, etc. The personal law of the Swabians [Lex Alamannorum (718 A.D.)] by Duke Lanfred and that of the Bavarians (Lex Baiuwariorum) (700 A.D.) took their place in the then existing legal systems and were applied and copied. The Lombards were the most prolific and inspired law givers of this age. The names of Grimweld (668 A,D.), Lintprand (713-35 A.D.) Ratchis (746 A.D.) and Aistulf (775 A.D.) are famous. They added to the efforts of Rothari. This gives a bird's eye view of the development of many laws in Europe taken from Pollock and Maitland,[2] and from other sources. We cannot go into the details of these diverse and multifarious laws but a scholar must know something about them.

The decadence of the Roman Empire in face of barbarian assaults produced feudalism in Europe. The word comes from Late Latin _feodum_ or _feudum_, a _fief_ or _fea_. In England, it is generally assumed, it followed the decadent rule of 'the fool', (Henry VI) in the 15th Century. The feudal system developed as a result of all these forces. The fundamental bond in this system was service to be given by the under-tenant and protection to be given by his superior. This mutual transaction was called commendation. In those difficult times the protection of an overlord was valuable to those who gave services. But it is wrong to say that feudalism began so late. In fact it had already made its appearance even in Europe. Although the Norman times saw it crystallise in England it existed in a crude form even in Anglo-Saxon times.

When we speak of feudalism, we speak not of one feudalism but of several. There is no single definition of the term. Maitland[3] attempts a definition which is still the best. He says that it marks a society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defence, on the man's part there was service and reverence, the service including service in arms. This marked an age in the History of Europe, England, the Muslim countries, Japan and China. As Esmein[4] says:

> " C'est d'ailleurs un type, qui s'est reproduit dans d'autres pays et a d'autre époques. I a existé une féodalité musulmane, originale et puissante. Une féodalité très developpé a vécu au Japon pendant des siècles, son abolition, aujourd'hui complète, na commencé qu'apres 1867."

(This is besides a type, which has reproduced itself in other countries, and at different epochs. There had been a Muslim feudal system which was original and powerful. A feudal system, much developed, had existed in Japan during centuries. Its abolition, complete now, did not begin till after 1867.)

A kind of feudalism existed in Egypt under the Pharoahs. But uncertainty under the 7th Egyptian Dynasty (there were 70 kings in 70 days) made the feudal lords more rulers than vassals. From the 10th Century B.C. to the 2nd Century B.C. China also had a feudal system. It came to an end about 220 B.C. under Shi-Hwang-Ti, the first Emperor who made himself a complete overlord. Before him in the valleys of the Hwang-Ho and Yang-tse-Kiang there were no less than five to six thousand small states with a dozen overlords. Amir Ali[5] mentions feudalism as having sapped the foundations of the Seljuk Empire.

After the fall of Rome during the Middle Ages feudalism in Europe was the main characteristic of society, from the 9th to the 14th Centuries. After Charlemagne's death, the weakness of the kings who followed led to Feudalism in France. It was an organisation of society through land-tenures. But it must have been present even before his time because one of his capitularies mentions it. The system as it emerged bound the inferior to his immediate superior and he owed him allegiance.

It is difficult to synthesise these and other systems by describing them in relation to each

country. The difficulties are great and the area of discussion is bound to be so large as to require many lectures. Pollock and Maitland[6] point out other difficulties when they say:

> "The impossible task that has been set before the word 'feudalism' is that of making a single idea represent a very large piece of the world's history, representing France, Italy, Germany and England of every century from 8th or 9th to the 14th or 15th. Shall we say that French Feudalism reached its zenith under Louis D'Outremer or under Saint Louis, that William of Normandy introduced feudalism into England or saved England from feudalism, that Bracton is the greatest of English feudalists or that he never misses an opportunity of showing a strong anti-feudal bias? It would be impossible to maintain all or any of these opinions, so vague is our use of the term in question."

Therefore, for want of time we cannot trace the varied aspects of feudalism in different periods of history and in different countries, but must content ourselves with setting out what can be regarded as the core by taking England as the most suitable ground to pursue our study. It must not, however, be forgotten that feudalism was a type of land management which appealed alike to all countries.

English law, it is accepted generally, began with the laws of Aethelbert of Kent, known as the Dooms of Aethelbert. The word 'doom' has no sinister meaning. It only means 'a law' in Anglo-Saxon. The most famous of these dφoms was the Doom-Book (Liber Judicialis) attributed to Alfred and was known till

the time of Edward IV but then it was mysteriously lost. This book is not to be confused with the Doomsday-Book which was a survey of lands compiled by five justices in the days of William,The Conqueror. Nor is the word 'doom' to be confused with the word 'doom' which means a sentence or judgement nor with 'fate' or destiny' as when we say 'he met his doom'.

In England elaborate dooms were compiled in the Roman manner but they were not overly indebted to Roman Law. The most important were those in Kent and Wessex. The laws of Aethelbert, King of Kent, and of Ine (700 A.D.) Anglo-Saxon King of Wessex and Offa of Mercia (800 A.D.) existed till the time of Alfred (900 A.D.). The Dane law also existed contemporaneously. Thus England had three laws. The West Saxon Law, the Mercian Law and the Dane law. Dane law was also subdivided into four regions and some of this customary law has survived.[7] From the days of Alfred we get laws from almost every king. This was the age of capitularies i.e. codes. The names of Edward, Athelstan, Edmund, Edgar, Aethelred and Cnut are known as law-givers. Of these the laws of Cnut are the best.

As was said above, the Dooms of Aethelbert followed the Roman style. Indeed this was the style which other races in Europe also followed. In Europe it was only a process of addition and improvement. The Dooms that followed Aethelbert's were built upon his, just as the Edicts of Rothari were employed by the later law-givers particularly in Lombardy.

The distinction between a law of a territory and the law of a people came slowly. As has been

said already the Dane law was the law of a territory while the Alamannic law was the law of the Swabians. The Lex Salica was a law of the people and not of a territory. Thus it was that occasionally the Romans were governed by Roman Law and the Lombards by the Lombard Law in the same territory. This was nothing new because the Romans had a different law for the peregrini. This reminds us strongly of the personal laws of the diverse communities in India. Different communities observe their own personal law and carry it with them wherever they go. The edicts of the Kings mixed also with custom which was equally binding and sometimes had even superior force.

It is in these times that we have a system of land ownership which was later known as feudalism. Maitland[8] says that it was curious that we heard of feudalism long after it had ceased to exist. He asserts that in his reading of Coke he did not notice him using this word at all. This was as late as the 17th century. Yet he informs us that Sir Henry Spelman[9] did mention it. But then according to him the true form was explained much later, by Sir Martin Wright and Blackstone, particularly the latter. Whatever it be the feudal system held sway for centuries and it is essential to know it to understand the growth of modern ideas of property.

The term feudalism mainly deals with dependent or derivative land-tenures. It deals with vassaldom in the ownership and enjoyment of land. The whole of the Common Law of England and also its political institutions developed out of treatment of land and proprietory rights in it. Maitland's[10] view is that

all public laws had their origins also in land laws although laws affecting land,properly belong to a branch of private law. In England proprietory rights play a political part even today. In our country, where we have adult franchise based on age and certain non-proprietory qualifications or rather disqualifications, we may find it difficult to comprehend that ownership of some property plays any part in the right to a vote. In the feudal society from which this political status grew, public rights and duties were intimately bound up with ownership of land. The political history, like the law of the Constitution in England, is a development of land laws.

The whole of the Common Law dealing with land and property stemmed from feudalism and it affected our country in no small measure. Here too we had a feudal system under the Moghuls, which continued till our Independence. Therefore, we can in this lecture make a study of English feudalism. We need not consider the European systems partly because many of the characteristics are common and partly because these systems did not influence our country. I shall, therefore, confine myself to English feudalism.

In English feudalism the ownership of land is to be imagined as a pyramid with the king at its apex. All land was ultimately derived from the king. He gave the land in his kingdom (except what he kept as royal demesne) to a body of selected persons who were said to hold it <u>in capite</u> or in chief. These persons in their turn divided their land (except what they kept as <u>their</u> demensne) among under-tenants who in their turn held as

under-tenants lower and lower to the tenants paravail i.e. those tenants who were lowest and made use of the land. The word 'paravail' meant ' for profit' and, therefore, they took the produce. In this way layers of sub-infeudation were created. However the sub-infeudation beyond that created by tenants in capite was stopped by the Statute of Quia Emptores in 1290. Thereafter there were only two classes below the king. The essence of feudalism was vassaldom, that is to say, the vassal was bound to his lord to do service. It might be military service (known as Knight Service) or agricultural service (known as Socage). The latter was divided into free-socage, and villein socage. Free socage was certain and honourable, villein socage was also certain but of a baser kind. By 12 Car. 2c. 24 most of the tenures were turned into free and common socage. The word "villein" has a sinister ring. But it comes from the Latin Villanus i.e. belonging to a villa or manor. They were also known as serfs. The serfs were rooted to their lands and passed with it like stones and trees.

The king expected service from his vassals and the vassals from those under them till we reach the villeins. In so far as the king was concerned he expected Knight Service (servitum militare). A certain area of land went with this service and it was known as Knight's fee and he had to attend wars for forty days in a year, if so ordered. There were also other burdens but we need not mention them. Knight Service was abolished by 12 Car. 2c. 24. Chief among them were aid, a levy to ransom the person of the King, make his eldest son a Knight and to give a portion to his

eldest daughter on marriage. When the holder died the King charged primer seisin either the whole or half the year's crop for recognition of the heir.

The lord had privileges also. These were regarded as 'jurisdiction' and as 'property' and part of the right the lord had over his land. These were mainly based on custom. The Anglo-Saxon population lived in small settlements governed by custom. These customs were common only to a degree. Among these was the custom to own slaves and women who were only a little better than slaves. Although it is usually said that feudalism was introduced in England by William, the Conqueror, it is difficult to say what was of pure English origin and what not. Before the Conquest, in the Anglo-Saxon codes there were tribal laws on land ownership, a little removed from custom. Although for a primitive people, they were of surprising details but with a pronounced religious bias. The Anglo-Saxons also recognised class distinctions. Eorls, Aethlings or Gesiths were protected persons. They were known as Coorls and Wergilds with protected rights which were acquired by birth in a family. The villeins were just above the slaves and the latter also occupied cottages and small portions of land. The unfree were also of several classes: Theow, Esne, Laet, etc. You remember how Cedric, the Thegn freed his slave Gurth by pronouncing the formula:

> "Theow and Esne (Thrall and Bondsman) art thou no longer, Folk-free and Sacless (a lawful freeman) art thou in town and from town, in forest as in field. A hide of land

I give to thee in my stead of Walbrugham, from me and mine to thee and thine aye and for ever ....." ‖

Thegns, just mentioned, had descended from very old times. They did service for the King in the field and were general agents of the King. In so far as the serfs were concerned their lot was far from happy. They had small portions of land allotted from the manor fields of the lord. They had to till the lord's demesne, grind their corn at the lord's mill, press their grapes at his wine press and bake their bread in his ovens. They should have been perquisites but the poor wretches had to pay heavy tolls for these things. The lord's demesne was so vast that it left the serfs no day-light for their own tilling which they had to do by moonlight. The lord could take the best plough or animal (and this was known as the heriot), on the death of the tenant before recognising the heir. It is curious that this custom continues till today in the case of copy-hold tenures but not free-hold tenures. In some manors it was commuted into a money payment. Lands were divided into demesne lands of the lord, the lands of the tenants, includ-ing those of the slaves, and folkland. Some of the dictionaries describe folkland as land held in villenage but Vinogradoff[12] in 1893 said that this was land held without a written title under customary law. The other land was known as boc-land: boc in Anglo-Saxon meant a charter. The earlier view, that this divided private from public property, is now discounted. The originator of the new theory really was Sir Henry Spelman. He said that folk-land was held by peasants and boc-land by Thegns and later by a Ceorl.

At one time it was firmly believed that there was heritability and primogeniture at all levels and particularly in fiefs held by military service. This was the view of Pollock and Maitland.[14] Later researches, however, have weakened this statement. Prof.Ganshof[15] and Prof. Plucknett[16] have opined that the hereditary principle did not apply. An excellent account of this controversy was given by S.J. Bailey[17] and S.E. Thorne,[18] It is now established that Pollock and Maitland,in reaching their conclusion,depended on material then discovered. The only evidence they had before them was that fiefs had descended from father to son. This made them assume that military land was 'owned' and 'not held'. In the beginning an 'owner' on transfering land to an outsider had to obtain the consent of the heirs and although consent disappeared and primogeniture began to operate, the military fiefs must have been regarded as heritable. The later writers have proved that military fiefs were not heritable but only an estate for life and continued as long as fealty was done and service given. They did, however, actually pass from father to son but not as a matter of right. In the first instance it was a gift by the overlord and when the son succeeded it was given to him as a gift. A curious custom propped up the gift. In the case of the death of the lord, the homage already given to the deceased lord protected the holder although usually there was a re-grant by the succeeding lord. Similarly, if the holder died the homage rendered by him was preserved and if the heir was of age and agreed to continue on the same terms of homage and service, he was recognised. That is how heritability came in later. It is all very complicated but understandable. Prof. Holdsworth[19], influenced by

Maitland,also advocates the same view that heritability of land had this beginning.

Professor Holdsworth in his monumental history, dealing with feudalism, has a new angle. According to him, although little distinction was made between property, jurisdiction, profits of jurisdiction, taxation and produce of taxation (they were mixed-up concepts), 'dominion' in feudalism meant both proprietary rights and some share of political power of the State. In this view he is not really original since the same view was propounded by Maitland.[20] Land really 'belonged' to some kind of office-holder on terms of service. The holders from Kings, as we noticed, were Earls, Earldormans, and they exercised certain governmental functions. These functions also took the character of 'proprietorship'. The land 'belonged' to the holder. In this scheme the king as the overlord expected diverse services, such as military service, care of roads and bridges and maintenance of law and order. As the power of the kings grew, the services were less and less required and exemption from them could be claimed. The laws of Canute and Henry I made such provisions. As part of the exercise of governmental powers, are mentioned SAC and SOC (the power to try a case) TOLL (power to take dues), TEAM (power to try a case against a stranger) INFANGTHEF (a right to hang a thief in one's jurisdiction provided he was caught redhanded which was described by the curious phrase 'hand-having or back' and UTFANGTHEF (a right to hang a person similarly caught in another jurisdiction). The exercise of this right was strengthened by mentioning that it was 'Cum jure regali' (by the law of the king). This was the first stage between the king and his tenants in capite. But it was

copied by under-holders in their turn and soon the distinction between right of property and exercise of governmental powers disappeared. They became the antecedents of a single 'ownership' by custom.

In Anglo-Saxon times the unit was five hides of land for a person to be a Thegn. A hide of land according to Mozley and Whitely's dictionary meant land which could be ploughed with one plough in a year. Local usage put it as equivalant to 60-100 acres. The Thegns provided military aid and other resources. Later as we have seen, this was commuted into Knights' fees and military tenure meant no more than payment of so much money.

The Normans were better organisers and administrators. They had a succession of able kings and were the first to make tenure a reality. The tenant held land not under a lord but of him. The proprietary character of the lord's interest is clear from the expression used. This made the title of the tenant a derivative title. Prof. Vinogradoff[21] said that 'the tenants could not go with their land where they pleased', that is to say, acknowledge another lord and yet continue on the same land. The subjection to a particular lord from whom the land was held was absolute. The lord had a right to hold court, try cases and summon the tenant. These were manorial courts and there were still higher courts till one reached the King's Courts. Feudal lords were scattered all over England, some small and some powerful with vast lands. The feudal system applied not only to lay lords but also to Church dignitaries. The Bishoprics of Durham, Ely and so on were of a piece. Many of these were not even considered as of the Crown. Holdsworth[22] gives the example of the Palatinate of Durham,which William

the conqueror did not even include in the territorial survey mentioned earlier. Stubbs[23] said that the Earl of Chester was a feudal sovereign just as the King was in Normandy.

The economic unit was the manor. According to Vinagradoff the word denoted estates not under royal but aristocratic administration. In the beginning there were many kinds of manors but not the kind described later by Prof. Vinagradoff.[24] Life in a manor has been the subject of study by S.H. Bennett,[25] and the Paston Letters give us much information. There were two kinds of subjects of the lord - the freeholder who could go to the King's Court and the villeins, who were completely in the control of the lord. The lord was the owner of the soil but he was more than a mere owner. He held full authority over his own district being only bound by contract of feudal service to the King and wielding his authority because of it. In course of time the lord held his land in demesne, and free and villein tenantry had their holdings and share of the common waste land. In addition to manors certain areas were recognised as boroughs and their residents were known as burgesses. By charter, by custom and by law these were privileged persons in various ways and separate from others.

Holdsworth[26] points out the anomaly of the Feudal system in England that as time passed the King slowly took over what he called 'jurisdiction' of the lord at the same time making the law of property more and more feudal in character. The English State, to quote him, was less feudal but

the law was more feudal than in any other country in Europe. According to Maine[27] the tenure which emerged became more profitable to the king in many ways. The King was content to let the lord own the land and take over his administration.

The doctrine of tenure thus came to be the foundation of all land laws. Where the King held the land, it was royal demesne, but every other acre was held <u>of</u> the King. If the man held it directly from the King he was a tenant <u>in capite.</u> Again if he held the land himself, it was in his demesne. If he liked, he could grant it to another who held it in service and so on. There were co-relative rights and duties some of which we have already seen. This was the special treatment of land on the English soil. The service could be different at each succeeding stage although the land was the same. The services ran with the land and failure to give service resulted in the distraint of land, rather curiously, in the hands of the lowest holder. The tenures went under different names - Glanvil[28] gives a list of which some were called Barony, Knight Service, Frank-Almoin, Serjeanty, Socage, Burgage etc. Then there were free tenures where the free tenants cultivated land with the help of labour, rewarding them by grant of land, money or share of produce.

The village labour, so occupied, held the land in an unfree tenure. They were mostly of the order of villeins having no status in the eye of law but what the custom of the particular manor gave them. It was only much later, when copy-hold tenure came to be recognised, that some legal recognition was given to them. A copy-hold tenure meant

different things at different stages. The most clear account is given by Stephen[29] but the following passage from Mozley and Whiteleys Dictionary will suffice for our purpose:

> "Copy-hold signifies tenure by copy of the court roll at the will of the lord of a manor according to the custom thereof. It is in manors only that copy-hold are to be found; and it is by immemorial custom of the particular manor that the copyholder's interest must be regulated. Copy holders were originally villeins or slaves permitted by the lord, as an act of pure grace and favour, to enjoy lands at his pleasure; being in general bound to the performance of certain services. By the time of Edward III, the will of the lord came to be controlled by the custom of the manor. Most of the statutes dealing with this tenure, its conversion into freehold commutation etc., are now embodied in the Copyhold Act of 1894. Under the Law of Property Act, 1922, copyholds are enfranchised and become freeholds (or in certain cases leaseholds - see parts V, VI and schedules 12, 13 and 14 of the Act)".

I shall revert to this subject later. For the present I shall continue the narrative of feudalism. We have seen that there were two sets of laws - one the Common Law which was the custom of the Kingdom and the other the custom of the district where the lord's court met. Slowly, however, arbitrariness became less and less and a body of laws emerged governing the rights and obligations of unfree tenure holders prescribing the time and season when agricultural and other services were to

be given. The customary payments were fixed and the duties and obligations of the landlords were defined and a system of commutations for services developed. The land still belonged to the lord; there could be no alienation or waste; it had to be cultivated according to the custom of the particular manor. This was not 'feodum' proper but it was very similar and soon had protection of the Royal Courts and most of the distinctions disappeared except in conveyancing.

It will be noticed that old feudalism attacked all Central Government. As the King's power grew, the Central Government assumed many of the jurisdictions and thus concentrated them in its own hands. Before this as Stubbs[30] described it "personal freedom and political right had become so much bound up with relations created by land, as to be actually sub-servient to it". Possession of land became the bondage of freedom. There was no free buying and selling of land.

At the time of the Magna Carta the feudal obligations still continued. The Charter recognised feudal bonds to some extent since the feudal obligations about wardship, marriages and escheats still remained; see Warner & Martin.[31] The Magna Carta dealt with some of the feudal grievances but not of all of them. The new feudalism changed the machinery of Government. It had begun to be realised that the ruling classes did not represent the people and that the nation was something different. It was the reign of the Tudors which saw the power of the nobles broken and thus England was saved from being divided into small principalities as had happened in Europe. The Tudors broke the political power of the nobles

and reduced their jurisdiction to a minimum, confining them to the management of their manors. What remained was so insignificant that we need not go into it. The manors that remained were of different sizes. Some were very large. One manor farm according to Maitland was worth only 1s.3d.[32]

The break-up of feudalism was indirectly occasioned by the Crusades; since feudal lords sold their lands to raise money for the expeditions. Meanwhile, the demand for arms, ships, etc had opened up new industries. Feudalism received its death-blow in France at the hands of the French Revolution. The principle of liberty and equality then inculcated left no room for the class of nobles who perished in large numbers. In Russia it lingered on till 1861 and in Prussia till the early 19th Century. The fight for independence saw its end in the United States because it was regarded as an English tyranny as stated by Lord Bryce.[33] In England feudalism suffered its first blow when Henry II commuted Knight Service for a fee and began levying Scutage (shield tax). The 39th and 40th Clauses of the Magna Carta freed the serfs. The King could thereafter rely upon paid soldiery. The yeomen and freeholders were allowed by the Assize of Arms (1181 A.D.) to possess certain weapons. The use of the bow and halberd reduced the power of the mounted nobles. These weapons could be used also by the King. Thereafter the King could rely upon paid soldiers and militia and the rebel nobles could be subdued. They thus sank into a position where they merely held land and indulged in hawking, hunting and fishing.

Other causes had indirectly contributed to the end of Feudalism. The feudal position of the lord holding his manor court died hard. Although the relations between the lord of the manor and his copyhold tenants were more regulated, and the Royal Court decided disputes, the tenants also came to be associated in the manor courts. Some disputes however remained, such as who should do the repairs, what should be the rent and how it should be paid. The Paston Letters[34] give the kinds of litigation and Robert Louis Stevenson, relying on them, has given an account.[35] The landlord was slowly losing ground and the lot of the farm labourer was improving. The plague and the gradual disappearance of serfdom was giving a handle to the labourers. There was shortage of land in the 13th century when big land-owners had got hold of land. The plague reduced the number of farm hands and paid labour was expensive. By the 17th century, the small landholder who had no rents to fall back upon became an island in himself and got lost.

The Agricultural Revolution had begun and it needed resources. New forms of acquisition of wealth, through law, commerce and industry began to play their part creating disparities and as small manors fell they got assimilated into big ones till, as Trevelyan[36] tells us, some lords like the Duke of Bedford owned whole counties. This change beginning with the Restoration went on till the time of George III. Feudal incidents were finally abrogated by property laws of 1925 and the holding of land in socage finally disappeared.

According to Roscoe Pound[37] the Common Law which had emerged from the land and feudal systems was more Germanic than Roman. According to him, when in the 17th Century Coke gave English Law its form, it was by a development of Germanic legal ideas with Roman Law worked into it. Roscoe Pound thought that the development was independent of Rome. The break-up of Feudalism was completed by the Industrial Revolution which we shall study in the next lecture. We shall then see the growth of socialism and finally communism which altered the entire approach to the notions of property seen so far.

- - -

1. Pollock & Maitland: History of English Law Before the time of Edward I.
2. Pollock & Maitland: Century by Century.
3. Maitland: Constitutional History (1948)
4. Esmein: Histoire du droit Français (11th Edn. p. 193).
5. Amir Ali: A History of the Saracens p. 331.
6. Pollock & Maitland: See note No.1.
7. Stenton, F: The Danes in England.
8. Maitland: note No.3.
9. A contemporary of Coke.
10. Maitland: note No.3.
11. Sir Walter Scott: Ivanhoe.
12. Vinogradoff, P: English Historical Review VIII, pp. 1-17.
13. Sir Henry Spelman: Feuds and Tenures V, 9.
14. See Note No.1. Vol.I, pp.314-316.
15. Professor Ganshoff: Feudalism [(1952) pp. 120-121]
16. Prof. Plucknett: Concise History of Common Law.
17. Cambridge Law Journal Vol.VIII.
18. Thorne, S.E.: English Feudalism and Estates in Land, Cambridge Law Journal (1959) p. 193.
19. Prof. Holdsworth: History of English Law.
20. Maitland: Doomsday Book and Beyond p. 344.
21. Note No.11.
22. Holdsworth: History of England.

23. Stubbs, W.: Constitutional History of England Vols. 1-3.

24. Vinogradoff, P.: Villeinage in England (1892) and The Growth of the Manor (1905).

25. Bennett, H.S.: Life on the English Manor.

26. See Note No. 20.

27. Maine: Ancient Law.

28. Glanville, Ranulph de (d.1190) Treatise on the Laws and Customs of England.

29. Stephen, H.J.: Commentaries on Law of England.

30. See Note No.23 Vol. I Section 69.

31. Warner & Martin: Groundwork of British History.

32. Note 20, mentioned in Holdsworth's History Vol. I. pp. 242

33. Bryce, Lord: American Commonwealth.

34. Paston Letters were written between 1422 and 1509 and give intimate account of the times.

36. The Black Arrow.

37. The Spirit of the Commonwealth.

L E C T U R E V

SOCIALISM AND COMMUNISM.

L E C T U R E V

SOCIALISM AND COMMUNISM.

The eighteenth century ended on a note of many changes. The first was the French Revolution which ushered in a new respect for the rights of the Individual and the second was the growth in the power of the capitalists following the Industrial Revolution which changed an agricultural economy to an industrial one, resulting no doubt in an increase in industrial production on the one hand, but accumulation of more and more wealth with factory owners on the other. This was the rise of the capitalist system envisaging private ownership of means of productions and free competition.

One would have expected that France would take the lead but although Louis Phillipe was liberal and his monarchy continued for 18 long years, France accustomed to doing things through Revolutions achieved little. People forgot what Casimir Perier, Theirs, Mole and Guijot[1] had said before. The people only believed in the efficacy of revolutions. The government was not republican nor democratic and not even a monarchy. Only 2,50,000 had the vote in France. Lamartine[2] said that France was 'bored' with the state of affairs! Even Mill[3] described it as 'wholly without the spirit of improvement.'

However, there was a march towards socialism, the term invented by Piere Leroux in 1838. The movement had better reception in England, where as we shall see, Robert Owen started the socialistic

movement. The best account in the shortest space is by Fisher,[4] who has described it as a spectrum having at one end the industrial life of labour and moving to equilization of wealth and opportunity and finally to the public ownership and control of land and the instruments of production which are the cardinal tenets of Communism at the other. Louis Blanc[5] in his book had suggested that Laissez-faire should yield place to the socialistic doctrine Savoire-faire.

We must not overlook the modern trend of international socialism in which all the material resources of the world are now sought to be shared and distributed. The concept of North-South and Third World, of which we hear so much today, had its beginning even as early as those times. But leaders including Lamartine failed to make a mark then. It was England which took the lead.

The feudal privileged classes we saw in the last chapter were replaced by another privileged class composed of men of wealth who were the product of the Industrial Revolution. The factory system was full of inequalities between those who owned land and capital and those who worked on wages. The working conditions were intolerable and the wages were very low.

The increase in the number of factories was creating many problems for Labour. The approach was delayed in England because it got embroiled in the titanic struggle with the rising power of Napoleon. It will be recalled that the first reforms came in the wake of the Reform Bill of 1832 which gave greater representation but more so after the Representation of the People Act of 1867 which

extended the franchise to working men in towns. Before this even Manchester and Birmingham did not have representation in the House of Commons. The new Poor Law of 1834 led to idleness especially in rural areas and prices were high and wages low. Apart from the evil of low wages to men, there was employment of children on much lower payment till by 1839 the employment of children below the age of 9 was prohibited and shorter hours of work for them were prescribed. A partial reform had been made by 1819. Much of this was due to the writings of Charles Dickens. Another step was the establishment of Trade Unions and they were legalised in 1824. When the Act of 1832 was passed the middle classes got the vote and the Anti-Corn Law League[6] and Cobden[7] began to depict the landlord as an oppressor. This was the beginning of the end of the feudal system. By these reforms the restrictions upon food disappeared and the control of the House of Lords was also gone.

A number of reformers arose in England and on the Continent. The condition of the poor, especially the working classes, was the main theme of reformation. Robert Owen in England and Saint-Simon and Fourier in France laid the foundations of a new approach to property ownership. The word socialism was first used in England about 1853. The followers of Robert Owen and Fourier and Saint-Simon were described as socialists. Socialism represented an interference by Society with privileges and with property on behalf of the poor. Prior to this the right to private property was regulated by

free competition. Socialism envisaged reform which would disturb this right and make provision for the resources to be employed in aid of the suffering classes. As a German thinker put it, it contemplated the common happiness. In this the will of the Individual was made subordinate to that of the Community. The inequalities of wealth were the main objects of the socialistic doctrines. It was considered that the legitimate function of the State was to reduce this inequality even by taking from those who had too little. This was to be a permanent arrangement and not merely an ameliorative measure in some calamity. This equality was to be achieved not only by social opinion and forces but by law and the force of the State. When we come to examine Communism we shall see the next advance in which the existing governments were to be superseded by an international combination of the workers of all Nations. Everyone knows the slogan: "Workers of the World Unite."

People have wrong notions about Socialism. It is not brought about through violence and is not revolutionary in character. It is a change of approach to the existing distribution of wealth and opportunity. The difference between Socialism and Communism is that the latter rather relies upon revolution. In Socialism the basic concept is that the working classes in a capatilist system are excluded from owning land and capital and have to depend only on wages. Land and Capital are owned by people who do not belong to the Working Classes. Socialism aims at Society assuming control of Land and Capital and equitable distribution between Capital and Labour. Communism goes

much further. It is here that we notice many differences even among the socialist philosophers. Without cumbering this lecture, with much detail I shall try to state them.

Saint-Simon would establish a hierarchy among Workers based on their capacity. He wanted to establish "an industrial state in which poverty is eliminated and in which science replaces religion." Fourier went further and said that first a minumum susbistence should be guaranteed to all alike and then the surplus divided between Capital, Labour and Talent. For this he made 12 parts which were to go to them respectively in the proportion of 5, 4 and 3. He was for removing all restraints including marriage! On the other hand Louis Blanc was in favour of equality of remuneration. He advocated change "from each according to his ability", to "each according to his needs". These were the views in France. In Germany the results of labour were to be divided and enjoyed according to the reasonable wants, but all had to work. The changes envisaged the existence of democracy as a first step because the force of public opinion was to be its sheet-anchor. It was pointed out that slavery was replaced by serfdom but serfdom was replaced by wage-labour. Therefore there should be a kind of collectivism even to the exclusion of private possession of Land and Capital. It was agreed that collective capital did not exclude all private property. There would be private property in the receipts after the equitable distribution of the product from combined effort. Therefore, just as Feudalism replaced Slavery and Capitalism

succeeded Feudalism, Socialism and finally Communism should replace Capitalism. In this way Labour would be emanicipated from the control of Capital, and this would mean participation of Labour in everything with Capital.

Property in this context passed through many stages. We have already seen that in the beginning common property was in common enjoyment. Later we saw that there was common property and some private enjoyment. In the next stage there was private property and private enjoyment. The last stages as we shall see are two. In the first there is social control of private ownership and enjoyment and in the second there is no private ownership but only of selected properties.

The Industrial Revolution led to the growth of wage earners and vast profits to the capitalists. Robert Owen in England was the product of Industrial Revolution. The French socialists Saint-Simon and Fourier were the products of the French Revolution and the class hatred and ideas of liberty which it generated. Robert Owen's views were first crystalised when he framed his scheme for Poor Law Reform. His work was followed by Maurice and Kingsley the novelist. The objects of the reforms were to give the workers a right to combine to secure reasonable hours of work and equitable distribution of the surplus left after giving a proper wage to the workmen. The charter of demands led to the Chartist Movement and the Chartists demonstration in April, 1848. The demonstration was unsuccessful but it won the support of Maurice, Kingsley and Ludlow. Kingsley's novel Yeast and Alton Locke exposed the evils of

the competitive system and advocated the doctrine of surplus value of Marx. The cooperative system, however, still continued to receive recognition.

In France, Saint-Simon had many suggestions. He contemplated that industrial chiefs should control society and must have the best men for the management of Labour. But all distinctions between Capital and Labour should be abolished. There should be no exploitation of Labour. According to socialist thinkers the evils in Society originated from private property, capital and the ownership of the means adopted for production. The inequalities which these created were hardened by the inheritance laws. According to their thinking the right of succession should be to the State and the State should be the sole proprietor. In this way a new beginning would be made by each individual and the hierarchy would be based on merit. While Saint-Simon was for centralisation of all authority, Fourier was for local and individual freedom. He was in favour of establishing communes which he called 'phalanges'. It was the apex of a pyramid beginning at the base in groups of persons who joined to form a series. A number of series formed a phalange. Thus a phalange would be the equivalent of a municipality. According to Fourier, from the wealth thus produced there must first be given a comfortable wage and the excess divided.

The history of French Socialism was a change in the fight for equality. Previously the bourgeoisie and the proletariat has joined forces to fight feudal power. When the franchise went to the former, they became the rulers. Then the proletariat thought in terms of revolution. There were out-breaks

at Lyon in France and Chartism (to be explained later) in England. Not only was the objective a share in the fruits of production but also a share in political power. The big names connected with the first objective were Louis Blanc and Pierre Joseph Proudhon. The thesis of Blanc can be summarised. He wanted Democracy as the first requisite and the emancipation of the proletariat, if necessary, by force of the State. His famous saying was, "The State is the banker of the Poor". He advocated the establishment of Industrial Associations, he called social workshops. He was against extra payment to reward merit. He said merit should be its own reward and asked how could Newton be rewarded for his merits! Emile Thomas wrote a history of National Workshops but the experiment itself was a failure.

Proudhon[8], as I said in my first lecture, regarded property as a theft in Nature. He said property was the right of an alien. If an alien died his property passed to the Ruler or the State and this should also be the case when an individual died. Property, when it took the shape of rents, profits and interest, was earned without any labour and effort. Hence it was theft. When Government protected such property it was oppression and man should become a law into himself. His writings on Property, on the misery of the poor, and the ideal society had more influence than had the other French socialists. His idea, that in a 'just society orderly anarchy would replace oppressive Government', seems to be contradictory. Oppressive Government one can understand but orderly anarchy is difficult to visualise. Another peculiar thesis was that a day's

labour equals another day's labour and the duration of labour is the best measure for value. This will reduce the gap between talent. As a writer said, that would mean that the worst mason would equal Phidias, the greatest sculptor of Greece.

In Germany, Ferdinand Lassalle and Karl Johann Rodbertus were theorists besides Marx and Engels. Lassalle put the question:

> "In social matters, world is confronted with the question, whether now when property in the direct utilisation of another man no longer exists, such property in his indirect exploitation should continue - that is, whether the free realisation and development of our labour-force should be exclusive private property of the possessor of capital, and whether the employees as such, and apart from the remuneration of his intellectual labour, should be permitted to appropriate the result of other men's labours".

He was in favour of workers' cooperatives as the means to socialism.

Lassalle thought that the mission of the working classes was to create a working men's State. In England Chartism failed but in France a member of the working class even entered Government. From the beginning the aim was universal suffrage without any property qualification for voters; only thus did the working classes hope to become rulers!

The difference between Lassalle and Marx, as we shall soon see, was the views they held about wages and the Iron law of Wages. Lassalle thought in terms of adequacy of wages, while Marx thought in terms of the surplus which the capitalists appropriate. The law of demand and supply, accord-

ing to Lassalle, also applied to wages. Higher wages tended to increase supplies. This was not a new idea. It had been held before by other economists. Lassalle favoured Trade Unions, Cooperative Societies, Factory Legislation because they all tended to reduce the force of Capitalism. Both Lassalle and Marx agreed on one thing that Capital is not only the means of production but it is the basis of the power of the Capitalists. Socialism in the hands of both sought to break the power which flows from Capital or, in other words, Wealth.

Before Marx and Engels came on the European scene, there was another social philosopher Karl Johann Rodbertus. He was in favour of revising wages only when the production improved and he would also classify the workmen. In this way he was in favour of recognising merit and he was in some sense, the father of what today is termed 'incentive bonus'. In all other respects his theories were the same.

It was in this context that we had the advent of Karl Marx who was born in 1818 and knew the French Socialists, specially Proudhon. His meeting with Fredrich Engels in Paris in 1844 began a friendship and collaboration which lasted 40 years and changed the condition of men in general. Marx was expelled in 1845 from France and lived for 8 years in Brussels. In 1845 Engels wrote about the condition of the working classes in England and in 1847 Marx wrote a reply to Proudhon's "Philosophie de la Misère" and called his book "Misère de la Philosophie".

There was a society in London which in many ways was the forerunner of the Communist Party in England and also the International. In 1847 the society was named the Communist League and its manifesto was the foundation of all Communistic writings later. Twelve years later Marx wrote his Critique of Political Economy, which he incorporated eight years later in his celebrated book "The Capital". It was Engels who edicted the second and third volumes from the manuscripts and himself wrote his "Socialism-Utopian and Scientific". These are the foundations of Communism as it is known today.

We have seen in brief the theory of surplus value which was the backbone of Marx's doctrines of Communism. Stated briefly again the wages do not exhaust the entire gain from production, there remains a surplus. This surplus value owes its existence to Labour. This was already recognised by earlier economists like Locke, Adam Smith and Ricardo. It was understood, as we have seen, by Owen and the Chartists and was appreciated by Rodbertus. It was the idea of Marx and Engels that Labour employed on wages replaced slaves and serfs who never enjoyed the value they produced. Here too the wage earners are denied the fruits of their labour when the capitalists appropriate the surplus value. This represents the unpaid share of the wages of workmen. The capitalists appropriate this and add it to their wealth and this leads to concentration of wealth in the hands of a few. Fourier called it the 'Crise Pléthorique'.

Communism thus became the breaking of this system, but to achieve it the aim was that the working classes should seize political power to

be able to gain control over all economic functions of society. It involved expropriating the capitalists and all means of production and the use of them for society through a natural evolution and not by compulsions. The natural laws of evolution in all economic matters should be independent of the 'will and power of individual men.' A corollary was the connection of the State with this change. It was said that after the working classes seize all power and the means of production and this movement becomes superfluous, it will automatically cease to exist when it assimilates unto itself all means of production. This is dialectic reasoning. Dialectic in this connection means:

> "that the business of inquiry is to trace the connection and concatenation in the links that make up the process of historic evolution, to investigate how one stage succeeds another in the development of society, the facts and forms of human life and history not being stable."

Marx used the threefold Hegelian processes: thesis, anti-thesis and synthesis. According to him private property won by a man is the thesis, private property won by the labour of another is the antithesis and expropriation of the wealth of capitalists by working classes is the synthesis. The second is the reversal of the first and the third the reversal of the second. These Hegelian processes are not understood properly and often misquoted in alien contexts.

The question is how is one to view these divisions? Are they mere rhetoric? They certainly are a part of the dialectical investigation which was analysed a little earlier. In our world, which

is materialistic, economic order should be understood as underlying all legal and political structure and even religion and philosophy. Once that is accepted then all the economic steps will follow from the seizure of political power by the working classes including the expropriation of all productive forces and the means thereof such as land, capital etc. Society should own these and the State which divides property protects it; when the State withers property will cease to exist. These teachings of Marx led to the attempt to unite the proletariat internationally and the creation of a social democracy. The slogan was "Workers of the World Unite" and this led to the formation of the International. It was an association of national socialists or labour parties to promote socialism and communism. The First International was founded in 1864 in London. The Second International came in Paris in 1889. The International failed during World War I and was not revived.

The labour movement which began in England, France and Germany was becoming international in character and something must be said of the steps which marked its growth. This represents the early history of the evolution of communism and the history is inseparable from the teachings of the great thinkers whom we have mentioned. In a word the Labour Movement which began with Owen became international in character, going beyond the bounds of any country.

As Bluntschelli[10] said a long time ago, unceasing time itself brings the States together and it is clear that the Labour Movement should also grow from the National to the International. It was

in 1836 that the German exiles at Paris formed the "League of the Just". This was a secret society. It led to the origin of the International Association of Working Men. This movement found its way to London and there persons of many nations joined it and it became International. This was the First International. In London itself the Communist League was formed in 1847. Their article of faith was:

> "the overthrow of the bourgeoisie, the rule of the proletariat, the abolition of old society resting on class antagonisms, the founding of a new society without classes and without private property ".(emphasis added)

Marx and Engels were commissioned with the drawing up of a manifesto. The Second Edition of 1883 did not see the hand of Marx. He died before it was finalised. Engels bemoans this in the Preface. The manifesto reiterated that the Iron Law of Wages, would itself abolish private property when wages were at subsistence level, because no private property would result from such wages. Therefore, the League wished to abolish all property acquired with the labour of others and to vest it in Society for the common good. The motto of the League was "All Men are Bretheren". It was replaced by "Workers of the World Unite". This has been the motto of this International Movement. The First International died a natural death in 1852. There was great increase in industries and capitalism had become very strong. The reactionary forces could only be contained when the capitalists themselves felt disturbed.

The Second International began also with another deputation of the French in 1862 to London. The occasion was the international exhibition in London in 1862. This contact led to a French

deputation next year and in 1864 an International get-together took place at St. Martin's Hall in London and it was resolved to draw up a constitution . Mazzini,[11] who was entrusted with the task, proved too political and was not the right person. Marx had made three points that Industrial Revolution and greater industrial activity had not improved the conditions of Labour, that a ten-hour working day was the limit and the capitalists were superfluous and should be replaced by Associated Labour in industries.

The International had a General Council in London. The opposition of the Anarchists under Bakunin[12] was not yet effective. Bakunin was a Russian and an anarchist. He was a member of the First International but having quarrelled with Marx was expelled. A succession of conferences took place every year in a different city and till 1869 the International met successively at Geneva, Lausanne, Brussels and Basel. The doctrines, were reaffirmed and the main was the transference of power. One achievement was the nationalisation of means of transport and communication. Mines, forests and land were recommended for nationalisation and it was recommended that equipment for production should only be procured through cooperative channels. An attempt to recommend the abolition of the right of inheritance failed on votes being taken. Although the voting was thirty-two for, and twentythree against, seventeen had abstained from supporting the ideas, and this was considered.

The Trade Unions of England, Germany and America began joining between 1866 and 1870. In 1869, however, Bakunin with his Anarchist bands joined the

International. They tried to change the whole idea. Marx was for trial of peaceful means and force only when necessary. Bakunin was all for Revolution. In 1872 he and his followers were expelled and the seat of the General Council was shifted to New York. The last meeting took place in 1873 at Geneva but the Anarchists saw to it that the International came to an end. Its doctrines continued to govern several countries but it lost the International character.

It is now necessary to explain a few outstanding ideas and theories connected with Communism. I begin with Lenin because he was the organiser of the 1917 Revolution and was the leader till his death. He was the first great leader of Russia. We have seen what Marx thought and said. I may, however, add something about the teachings of Marx and his collaborator, Engels. Engels' contribution was much smaller. He wrote about the working classes in England and his main contribution was his systematization of 'dialectical materialism'. I explained it earlier in this lecture. Materialism and idealism are obviously antagonistic. In materialism a socialistic society is evolved, throwing down class and property structures of Society which are the basis of production-systems in a capitalist society.

It is wrong to think of Marx as a law-giver. His theories were all economic or political. His main contribution was the transmutation of private ownership into public ownership by peaceful means and economic readjustments. In this the attack of Marx was on Law as a weapon to maintain the Individual in subjection at the instance of the wealthy. To obviate this, proletarian dictatorship was the

answer, so that the State which upholds the production system, in which capitalism and wealth flourish, may wither away. Lenin enlarged on it as I shall show. This theory was misunderstood in India as being against the judicial system and the political leaders thought that the judiciary was the main obstacle. Marx never said this as I attempted to prove in the case of E.M. Namboodri-pad. I was surprised to see that a professor recently also missed the distinction between legal and judicial systems. I am glad, this was appreciated by no less a person than the Lord President[13] of the Malaysian Federal Court who quoted me with approval. The distinction between law as the force and the judiciary as the servant of the law is perhaps too subtle for the common understanding. According to Marx if the State withers away there would be no need for law which is the instrument to sustain a capitalist state. It is to be noticed that inspite of these views, also accepted by Lenin, neither the State nor the Law have withered away and they are very much there everywhere and even today more strongly control economic adjustments than before. Even in the proletariat dictatorship there must still be law but if justice and equal treatment are the criterion of civilization it is a moot question whether the machinery to administer law such as it is can be dispensed with. The Judiciary, let it be understood, does not go by wealth. Some judges may, even as some surrender to power. Let me at this stage explain two terms I have been using namely bourgoisie and proletariat in the way Engels used them. To Engels bourgeosie meant the capitalists, that is, employers of wage

earners. The wage earners were the proletariat and they were persons who had not the means of production or even under their control and lived by selling their labour powers,in exchange for wages,to the employers.

We next turn to the Communist Manifesto of Marx and Engels to see the bèginning of the modern theories. It is usual to name the product as 'Western Marxism'. It reached Russia first through George Plekhanov[14] in 1880. Marxism then moved from Russia to Western Europe where the Russian populists formulated their theories. The second movement was ten years later and in the reverse direction when the new adherents from Europe went to Russia and stayed there. Russia had witnessed the reaction under Alexander III who undid most of what was done by Alexander II in the way of reforms. The shift to Marxism was helped by the famine in 1891-92 but the peasants did not rise as was expected. Therefore, the teachings spread to the urban proletariat.

The Manifesto had emphasised the position of the proletarians. All earlier doctrines of socialism were criticised as ineffective and Utopian. The Manifesto described the earlier efforts as 'Feudal Socialism' or 'Petty-Bourgeois Socialism'. It called the teachings of Marx and Engels as 'German' and 'True Socialism'. They charged that the Bourgeois also attempted socialism to create an atmosphere in which exploitation would work better. At first the attempt was to reach the western standard in living. Vasliy Vorontsov,[15] and Serge Bulgakov[16] wrote in favour of western culture aiming thereby to change "the

exclusively peasant and crude country." This was to result in bourgeois capitalism. Lenin's great contribution was to halt this process. Lenin hated the idea that these 'liberal groups' should have any hand in progress from feudal Russia to a new Russia. In his book[17] he expressed views which later became the basis of Bolshevism and Soviet power. Shortly stated he was restive of any intermediate period of any dealings with bourgeois capitalism and doubted if it could ever lead to a successful revolution.

Lenin's views, especially those he expressed in his book, led to a split between the Bolsheviks and Mensheviks. The Mensheviks (means the minority) were liberal and although they supported the Russian Revolution of 1917, they were suppressed. Lenin kept on modifying Marxism. In his later book [18] he accepted the 'two revolutions theory' which Marx had advocated. The first revolution was to be led by the urban proletariat but having the support of some bourgeoisie. The second would be supported by the revolution of the rural proletariat. As Professor Mandel[19] puts it:

> "The second, to begin soon afterwards, would also be led by the urban proletariat but would be supported by the rural proletariat, the poor peasantry in opposition to the private-propertied wealthier peasantry. This would be the proletarian revolution."

Lenin had strong opposition also. He broke with Bagdanov[20] (pseudonym of A. Malinovsky) who had joined Mach,[21] Dan[22] (pseudonym of F. Gurvich) a Social Democrat and a Menshevik. Lenin had the greatest support from Kerensky,[23] the first Premier

of the 1917 Provisional Government but Kerensky, who was a bit of a 'liberal bourgeois' was overthrown by the Bolsheviks in the same year.

I need not enter Russian History any deeper. The Bolsheviks policy I had outlined in 1972 in my Shri Ram Memorial Lecture[24] and I had then said:

> "To understand this change I wish to read to you the Russian Declaration of the Rights of the Toiling and Exploited Peoples, made at the All-Russian Congress of the Soviets in January, 1918. I am sure it will remind you of many things we have seen recently in our country. This is what it says:
>
> "To supress all exploitation of man by man, to abolish for ever the divisions of society into classes, ruthlessly to suppress all exploitation and to bring about the socialistic organisation of society in all countries by:-
>
> (a) Abolishing private property in land;
>
> (b) Abolishing private property in the means of production;
>
> (c) Control of industry by workers;
>
> and (d) Nationalising Banks.

I shall not enlarge upon this theme further just now. I shall return to these four points in a subsequent lecture when I speak of India. Then I shall show how they influenced us. We have so far seen what was the nature of Feudalism in Europe and some other countries and what were the forces opposing it.

It will however be completely wrong to think that the theories of Marx and Engels had uniform

acceptance everywhere. First difference came from the Christian Socialists in the sixties of the 19th century and Charles Kingsley, whose name I mentioned earlier. These tried to wean people from all ideas of violence and hatred and preached the reform of social and economic institutions through love and Christian liberal ideas. Similar was the teaching of priests on the Continent. The Chartists in England, who were also mentioned earlier by me, started their movement thirty years before. They wanted political rather than economic reforms. They drew up their six point demands which were known as 'People's Charter' supported by a petition to Parliament signed by 1.2 million persons. The demands were (i) Universal male suffrage, (ii) Secret Ballot, (iii) equal electoral districts, (iv) abolition of property qualification for Members of Parliament (v) abolition of payment to the Members and (vi) annual general elections. The Chartist movement failed after only ten years. This was mainly because there were struggles for power within the movement but it was indirectly because the economic conditions in the country were improving.

After 1875 German Socialism which had split with the Marxists on the one hand and followers of Lassalle on the other, tried to combine and did meet at Gotha. A programme drawn up then was rejected by Marx. His reasons were given in his Critique of the Programme which was his last written manuscript.

At this time Louis Philippe who had begun to describe himself as the "King of the French" instead of as "King of France", was more involved with the rich bourgeoisie. Although his reputation had

received much boost because of the acquisition of Algiers, he became so indifferent to social and economic refors for the proletariat and to the demands of the middle classes that he was overthrown in 1848.

We are well aware of the twin revolutions of 1905 and 1917 in Russia and the subject is so vast that we must read many books as no summary of it is possible. It is sufficient to say that the First Russian Parliament known as Duma came as a result of the first revolution and lasted till 1917. By its establishment Russia had a constitutional monarchy with a bicameral legislature, which had only half elected members, the rest being nominated by the monarch. Only four such Dumas sat, the first two were dissolved by Emperor Nicholas II because of their radical attitude. The third and fourth lasted till 1917 but at the end a provisional government forced the Emperor to abdicate. There were two revolutions in February and October 1917 and at the latter Revolution power passed to Lenin after a short stint of provisional government under Alexander Kerensky.[25] He lasted only from July to October 25, when he was overthrown by the Bolsheviks. The Soviet Union was established in 1922 after the Civil War ended in that year. The Russian Soviet Federal Socialist Republic was complete. The Golden Anniversary of the 1922 Revolution was celebrated recently.

The history after Lenin's death in 1924 is bound up only with Stalin's policies. Having eliminated all opposition he established his own economic regime. He abandoned Lenin's New Economic Policy (NE) which had worked between 1921 and 1929. This allowed private enterprise in several fields,

like agriculture, trade and industry. This was all undone by Stalin,[26] who, having seized full power in 1929, started his famous five year plans and collectivisation of industry and agriculture.

After Stalin's death came the New Revisionists. It was an attempt of 'trying to make a bourgeois society produce socialist citizens'. They were still hoping that the State, as the instrument of force, would wither away under Communism. To study these developments we must read Milovan Djilas[27], Kalakowski[28]. I cannot enter this subject which is very vast. Suffice it to say that they both demonstrate that very little shift in attitude turns 'the entire powerful battery of Marxist social, economic and ethical judgments against the very system that devotes so much of its resources to inculcating these judgements'. I shall leave the Russian scene on this note.

Another shift in the Communist doctrines came from China, and it was towards pure Leninism. It was in 1949 when the Guomindang[29] led by Chiang-Kai-Shek[29] was driven into exile in Taiwan, and Mao-Tse-Tung[30] came to power. The relations then with Marxism were close but after the Soviet aid was withdrawn, relations became strained and Mao-Tse-tung started the Great Proletarian Cultural Revolution which was aimed at eradicating 'revisionism' and to see that no ruling class emerges in the State. Today also the hostility to Marxism is still to be noticed. I cannot, for obvious reasons, go into this thorny subject. Thus there is the growth of socialism and communism.

Before I leave this discussion of foreign institutions and pass on to our Indian conditions, I wish to put before you a summary which Engels

himself made of the changes in the rights of property. He says[31] --

> "That is, all <u>written</u> history. In 1837, the pre-history of society, the social organisations existing previous to accorded history, was all but unknown. Since then Haxenthausen discovered common ownership of land in Russia, Maurer proved it to be the social foundation from which all Teutonic races started in history and, by and by, village communities were found to be, or to have been, the primitive form of society everywhere from India to Ireland. The inner organisation of this primitive communitic society was laid bare, in its typical form, by Morgan's crowningdiscovery of the true nature of the <u>gens</u> and its relation to tribe. With the dissolution of these primeval communities, society begins to be differentiated into separate and finally antagonistic classes."

This is exactly what we have seen so far in great detail.

In the next lecture I shall trace the notions of property in India from early times down to the times of the emergence of the British rule, showing the institutions which had grown in India through the Hindu and Mohomedan Periods. I shall next show what changes came in the days of the East India Company and later under the British Crown. Then we shall be in a position to understand the present Constitutional approach to the problems of private ownership of property.

1. French Revolutionary Socialists.

2. Lamartine, Alphonse de (1790-1869)
French poet and later an active political champion of republican ideals. He was briefly head of the provisional government after the Revolution of 1848. His Meditations Poètique, and Jocelyne are well-known.

3. Mill, John Stuart (1806-73)
He was an official of the East India Company and a member of Parliament. His Utilitarianism influenced liberal ideas. His famous works are Liberty, Representative Government, Principles of Political Economy and tract on Utilitarianism.

4. A History of Europe.

5. The Organisation of Industry (Organisation du travail)
French socialist (1811-1882). He was a Utopian and revolutionary who, from 1839, advocated his doctrine of equality.

6. An organisation formed in 1839 for the repeal of the Corn Laws. This was under the leadership of Cobden and John Bright.

7. Cobden, Richard (1804-1865)
See note 6 above. He also opposed Palmerston's "glory and gunpowder" foreign policy.

8. French Socialist. His tracts "Qu'est-ce que la properiété" "Système des contradictions économique ou philosophie de la misère".

9. Preface to Bastial-Schulze, quoting from his System of Acquired Rights.

10. Theory of State.

11. Mazzini, Giuseppe (1805-1872)
Italian patriot. He worked for the unification of Italy.

12. Bakunin, Mikhail A. (1814-1876) - Russian Anarchist.
He studied in Germany and came under the influence of socialist philosophies. He took part in 1848 Revolution and was arrested and handed over to Russians,who exiled him to Siberia. He escaped and reached London. At the First International he clashed with Marx and was expelled.

13. Lord President M. Suffian.

14. Plekhanov, Georgi. V. (1857-1918) - Russian
Revolutionary and a Marxist. He is known as the "father of Russian Marxism". He founded the Russian Social Democratic Workers' Party (1898). He thought that Russia must first pass through industrialization and capitalism before it reached socialism. He sided with the Mensheviks. He left after the Bolsheviks were victorious and lived in Finland thereafter.

15. Vorontsov, Vasily (Pseudonym V.V.) (1847-1918)
A Russian populist economist. He opposed Marxism. He had 'western sentiments'. He wrote:

"Russia belongs to the family of civilized nations and, moreover, has entered the twentieth century of our era. This means that its needs and the forms of their satisfaction must be commensurate not with the cultural level on which it finds itself, but with those forms that have been devised and applied by Western Europe ..... We want to eat, dress, entertain ourselves and construct our homes, streets, and urban buildings on the model of what is being done in these area by modern Europe, and not by the Europe of the Middle Ages ....."

16. Bulgakov, Serge (1871-1944). He began as a Marxist but moved over to philosophical idealism and later to religion.

17. What is to be done.

18. Two Tactics.

19. Mendel, Arthus P. - Editor Essential Works of Marxism.

20. Bogdanov, A (Pseudonym A. Malinovsky) A Marxist philosopher and economist. First a friend of Lenin but opposed his joining the Duma.

21. Mach, Ernst (1836-1916) an Austrian philosopher and a physicist.

22. Dan, Fedor (Pseudonym F. Gurvich). A Russian social democrat and a Menshevik. He made good studies of Marxism but he was opposed to Lenin.

23. Kerensky, Alexander - Russian socialist. He was the first Premier in the 1917 Provisional Government. He was unable to cope with the problems and was overthrown.

24. A Judges' Miscellany (Second Series, Tripathi, p.7).

25. See note 23 above.

26. Stalin, Joseph (1879-1953) Born in Georgia. He became a Marxist in 1890^{s} and was expelled from his theological College for revolutionary activities. He became a Bolshevik under Lenin. After Lenin's death in 1924 Stalin began to eliminate the rivals and specially Trostsky and reached power after 1929.

27. The New Class.

28. Responsibility and History.

29. Guomindong. (kuomintang) The National Peoples' Parts of Taiwan (1912). Their leader was Chiang-Kai-Shek.

30. Mao-Tse-tung (1893-1976).Communist Statesman.

31. The Origins of Family, Private Property and the State.

LECTURE VI

THE PRE-BRITISH PERIOD IN INDIA

L E C T U R E VI

THE PRE-BRITISH PERIOD IN INDIA.

We are too apt to consider the Aryans as the originators of most of the ideas of government and administration. Nothing can be further from the truth. Chiefs heading a feudal society with a revenue-system albeit paid in kind was not unknown among the Dravidians.[1] But it is difficult to say what was inherited from the original polity of the local inhabitants of India before the advent of the Aryans and what was introduced by the latter. J.F. Hewitt's[2] and Cunningham's[3] studies have done much to clear the misconception. Even the Muslim conquerors had much to learn from both the Aryans and the Dravidians.

Colonel Todd[4] proves that the land-system in Rajasthan is, even today, a lingering reminder of the fusion of Aryan and Dravidian civilizations. The Muslim rulers only changed the nomenclature to Arabian and Persian terms but did not radically alter the system. With the change of rulers came a new race of landowners, mostly of Muslim origin. Baden Powell[5] has given a list of such terminology. We have evidence that in the time of Manu there was great order in the enjoyment of land, although Manu does not tell us anything about the land-system. He is more concerned with questions of inheritance and rights within the family.

I have looked carefully through the excellent translation of the Ordinances of Manu by Arthur Coke Burnell[6] (completed and edited by Edward W. Hopkins).

This book was published in 1884 and the second edition appeared about a dozen years ago through the efforts of Oriental Books Reprint Corporation of Delhi. Throughout, Manu's attitude was more religious than economic. He divided property into property of gods and property of demons, according as the owners did sacrifice or not. He gave two different sources of property. In the first he said that Brahmins got property through prayers and oblations, the Kshatriyas by their valour and strength of their arms. Only Vaishyas and Sudras got it as wealth, by which he means,earned it. He next described seven just means of acquiring property. They were: i. Inheritance ii. Gifts iii. Purchase iv. Conquest v. Money lending vi. Labour and vii. Receiving from the good as presents. The only protection of property is disclosed in two ways. Lost property,with the whereabouts of the owner unknown, was to be kept for 3 years and then taken by the king, if the owner did not appear to claim it. There was a duty cast on the king to protect the property of women who had no sons or families and guardians. As regards ownership, Manu named three persons as being without property. They were: wife, son and slave, the reason being that they themselves were owned or belonged to someone else. There was one harsh provision. It was that the property of a Sudra could be taken away by a Brahmin. There were rules for partition of property but clothes, vehicles, ornaments, prepared food, water, women, religious wealth and paths were impartible.

Next I looked very closely into the excellent book by Dr. U.C. Sarkar.[7] He considers the subject in three divisions: The Dharma Sastras which are dated 1000 B.C. to 1100 A.D.; The Nibandhas which are divided into two parts:i. Commentaries on the earlier works in the period covered by the Dharma Sastras and the late Smritis and ii. The Nibandhas; and the later commentaries from 1100 A.D. to 1772 A.D. In between, Dr. Sarkar considers lay the Arthasastra of Kautilya of 300 B.C.

I have looked through all the authorities namely Gautama, Baudayana, Vasistha, Brihaspati and others. The prominent topics dealt with by them are usury and inheritance. There is much said about deposits. The rules on the subject of deposits are very similar to the modern rules under the Law of Bailments. Before I read these rules I used to be impressed by the Roman Law on the subject of Bailments. There is no doubt that the Romans had made a very analytical exposition of the entire law and even the English terminology has been unable to express the shades without the assistance of the Latin expressions. The Indian counterpart is not so elaborate but is sufficiently impressive and is well-worth reading so as to be able to compare it with the Roman analysis. The Indian jurists also speak about partition and how it should be carried out and what the respective shares of the male and female relations would be on partition. But the subject which had received elaborate treatment is that of Stridhana. It is dealt with by Gautama, Baudyana, Kautilya, Narada and Yajnavalkya. There were some new things said occasionally. Vasistha laid down the rules of adverse possession and the period stated by him was ten years and also spoke of property which would not be lost even by adverse possession.

Kautilya spoke of recission of contracts and resumption of gifts, a topic not much dealt with by others. Brihaspati indicated when title did not pass even after an ostensible sale. Narada was the most prolific of all. He dealt with no less than eighteen topics and stated the rules for interpretation and construction of evidence. It is stimulating to find that adequate distinction was made between direct and circumstantial evidence. Boundary disputes and the principles for deciding them, received attention mainly from Yajnavalkya and Narada. On the whole, laws, both civil and criminal, were fully considered but the subjects most prominently dealt with were marriage and marital relations.

In later times just as we have had judge made law, Hindu jurists recognised Vyavahara (judicial decisions) as a source of law. Dr. Sarkar has also said that Charitra (custom) was also a strong source of law. Unfortunately when Dr.Sarkar came to specific customs, he failed to give the examples. Dr. Sarkar got involved with some observations of Mayne and did not describe the role played by custom as law or source of law. When we read closely his writings we find references to customs but not any that had a bearing on property. When property is mentioned, it is only dealt with very cursorily.

That there was some kind of land-tenure goes without saying. A kind of feudal society existed. The caste system had already developed and perhaps the upper two classes were the over-lords and the tenants belonged to the lower two classes. As land was not at all scarce, Manu endorses what we saw in the first lecture, that

unoccupied land went to him who cleared it and brought it under occupation. There is no trace of communal enjoyment of land and Baden Powell is very definite having examined several writers and reports. The concept of a headman and a chief is to be found, although Powell is of the opinion that there were 'landlord villages' and 'non-landlord villages'. Sir George Campbell[8] expresses his doubts in these words:

> "The long-disputed question, whether property in land existed in India before the British rule, is one which can never be satisfactorily settled, because it is, like many disputed matters, principally a question of the meaning to be applied to words ..... We are too apt to forget that property in land is a transferable marketable commodity, absolutely owned and passing from hand to hand like any chattel, is not an ancient institution, but a modern development, reached only in a few very advanced countries....."

If we put the fifth century B.C. as the time when Manu wrote, we must compare with Campbell's statement, the following observation of Manu made centuries earlier.

> "The sages declare a field to belong to him who first cleared away the timber."

Powell quotes Kulluka Bhatta's gloss on the last words, as indicating 'who cleared and tilled it.' If we accept this as the right interpretation, we get to the position we noticed about the primitive societies in the first lecture. A close reading of Manu will also disclose that while he mentions plots

of land in ownership of individuals, we fail to find reference to a land-system in which there was a landlord. There is however reference to the overlordship of a Raja and the existence of village life. It seems that the feudal structure was much simpler.

It is possible to spell out property in land from this evidence. Elphinstone[9] sums up the essentials of property rights thus:

> "Property in land seems to consist in the exclusive use and absolute disposal of the powers of the soil in perpetuity, destroy the soil where such act is possible. These privileges combined from an abstract idea of property which does not represent any substance distinct from these elements. Where they are found united there is property and nowhere else".

Understood in this sense we can say that a strong right in land existed from the days of Manu if not earlier. State recognition of the right would have come with law. This right was recognised by the community. To the evidence available we have to apply the tests indicated by E.Adamson Hoebel.[10] He says:

> "There are two essentials of property (i) the object and (ii) the web of social relations which establishes a limiting and defined relationship between persons and object."

I shall revert to Hoebel's other statements later in another lecture when I shall show a dissent. For the moment we can see that the occupation of land of which Manu spoke was characterised by 'a limiting and defined relationship'.

If we turn to the Muslim times we find that the Muslim conquerors, if they stayed in the conquered territory, were content to receive tribute only. They were not in the beginning bothered about details. Later in Sher Shah's time and later still in Akbar's time, a proper land-system was created. In respect of land not occupied from some previous time, the rule was about the same as in Manu, namely, that it was to belong to him who cleared it. Col. Vans Kennedy[11] says that "all Mahomadan Jurists agree that the person who first appropriated and cultivated waste-land became ipso facto the lord of the soil".

The right must have been exercised only on land to which a prince or overlord did not lay claim. Otherwise, the cultivator would either ask for leave or be penalised. Baden Powell relates an incident mentioned by Shore. Shore put a question to the Historian Ghulam Hassan whether an occupant must pay for the land which was occupied in these circumstances. His reply was -- "The Emperor is proprietor of the revenue, but he is not the proprietor of the soil."[12]

However in the Preamble to the Madras Regulation XXXI of 1802 (which was later repealed), it was said that the property in land belonged to the Government 'by ancient usage'. The truth, therefore, must be between the two. It is obvious that different Rulers had different ideas and the nature of the land must also have played a decisive role. The British, when they replaced the Ruler, succeeded to the position of the Ruler regarding the land and those upon it. Certain of their rights must have received recognition and others must have been rejected. New terms and conditions must, in quite a few cases, have been imposed on the land and its occupant. I

shall borrow from Baden Powell[13] his five-fold features of the British attitude. They are:

"(1) Government used its own eminent claim as a starting point from which to recognise or confer definite titles in the land, in favour of persons or communities that it deemed entitled."

"(2) It retained the unquestionable right of the State to all waste lands; exhibiting however the greatest tenderness to all possible rights either of property or of user, that might exist in such lands when proposed to be sold or granted away. This right it exercised for the public benefit, either leasing or selling land to cultivators or to capitalists for special treatment; thus encouraging the introduction of tea, coffee, cinchona, and other valuable staples. Or it used the right as the basis for constituting State Forests for the public benefit, or for establishing Government buildings, farms, grazing-grounds and the like."

"(3) It retained useful subsidiary rights - such as minerals, or the right to water in lakes and streams. In some cases it has granted these away, but all later laws reserve such right."

"(4) It retained the right of escheat; and of course to dispose of estates forfeited for crime, rebellion etc."

"(5) It reserved the right necessary for the security of its income (a right which was never theoretically doubtful from the earliest times), of regarding all land as in a manner hypothecated as security for the land-revenue. This hypothecation necessarily implies or includes a right of sale in case the revenue is in arrears."

We do not know the bond that tied the occupant with the Raja. But we have ample evidence of the Mohamedan Period and we know that the Mughal land-system was highly feudalistic in which military service was the bond between the Ruler and the inferior holders of land. There were many grades of land-rights resulting from conquests and there were varying rights in the soil. Tenures arose from official positions, grants by Rulers and there were other privileges in which assignment of revenue or a share in it was also some consideration. Indeed there was creation of farmers of revenue as in France before the Revolution. Collection of revenues carried a certain superior proprietary right in the soil. I shall now describe this.

We have already had a glimpse into the land-systems of the Aryans replicas of which existed down to our Constitution in Rajputana and the Himalayan foot-hills. The Muslim Rulers had modified some of the names but had kept most of the essential characteristics intact. At the beginning of the rule of the East India Company and down to the advent of the Government of the Crown these essential characteristics continued and were confirmed at the succeeding settlements. The term 'settlement', be it understood, meant the process of determining the amount of land revenue due from any village or district but it had different implications in different parts of India. Also the duration of the settlement was even different in different places and at different times. In Northern India, the settlement was something of a bargain in which terms were offered to the landowner or the body of villagers who had to accept it by signing a document called the Kabuliyat. In other parts, the settlement did not concern the 'proprietor'

who had to accept the terms, but concerned itself with the land only and the amount was fixed on an appraisal of its yield, no matter who paid it. Here too the amount was sometimes due from a proprietor who was the superior holder and who had under him inferior proprietors of varying grades down to the peasants. Otherwise it was assessed on the land and was payable directly by the tenantry. The Raiyatwari system was a system of Survey and Land Revenue Administration generally, in which the assessment fell directly on the tenant and between him and the Government there was no middleman. This system was first adopted in Madras. The Board of Directors were won over by Sir Thomas Munro on his visit to London in 1807 and the Board of Directors on 16 December, 1812 sent a despatch[14] which read:

> "It remains for us .. to signify to you our directions that in all the provinces that may be unsettled when this despatch shall reach you, the principle of Raiyatwari system, as it is termed, shall be acted upon and that where village rests upon any other principle shall have been established, the leases shall be declared terminable at the expiration of the period for which they may have been granted."

At that time the lease-system prevailed and many such leases were in vogue. The Raiyatwari system however, did not come into force for six years. From Madras, where it began, as the first venture, it spread to Bombay, Berar and elsewhere.

This was the lowest among the tenures in India. It was, as stated, a direct relation between the raiyat (tenant) and the Government. But other forms also

continued. The next was the malguzari system - which was most current in the Central Provinces. A malguzar was a person who 'paid revenue assessed on an estate or village, whether on his own behalf or as the representative of others (co-sharers) and whether he was a sole or joint proprietor, or a holder under a proprietor such as a zamindar'.[15]

The next higher grade was that of Zamindars and Taluqdars. The term Zamindari meant different things in different parts of India. In general it meant a holder of land (zamin, land and dar holder). In the Punjab, beyond the Chenab, this word was commonly used for any Mohamedan cultivator, big or small, just as the word 'jat' was used for a Hindu cultivator. On the other hand in Bengal and Madras where there were big zamindars they were landlords and land proprietors and not mere cultivators. Under the Permanent Settlement they were so described. Indeed,as Baden Powell says,[16] all such Zamindars were described as Zamindars with a capital Z. In the Punjab and in the areas which then were known as North West Provinces, the term implied a class which claimed a whole area including lands of all categories. There might be a single proprietor or a body of proprietors. In the latter case such villages were known as joint villages. The Zamindars in the Punjab and Sindh were the descendants of former chiefs and by virtue of this connection enjoyed superior rights over the cultivators. In the United Provinces the term got a different meaning. There the Taluqdars had what were known as zamindari rights, although they were not themselves known as zamindars. They had even sub-infeudation and the subordinate Taluqdars were known as Darpatni Taluqdars. The Taluqdars were well paid for their services by keeping a part of the revenue and to get rid of management, they appointed

darpatni-taluqdars. There were instances when the darpatnis also sub-let to se-patnidars. Even lower some aliquot shares were sub-let. As a result the permanent holdings in Bengal reached to a figure of over a million and all of them were very prosperous.

The jagirdars had their origin in the times of the Mohamedan Rulers. In this tenure the public revenues from a tract of land were allowed to be appropriated by a person. In the beginning military service was expected and in the Muqhal times these went as appanages to selected officers and title-holders. These were ordinarily for life and resumable. In fact even later in British days Jagirs were granted for memorable services. Under the Sikh rule Jagirs were common. The Hindus also divided lands into khalsa and jagir lands. Sometimes waste lands and sometimes outlying and difficult areas became the subject of such jagir grants. One such was the Ghatwali grant where the grantee had to keep the mountain passes free of marauders and prevent raids from the hill-tribes on the plains. I remember dealing with one such case in the Supreme Court. Another grant was known as Girasya jagir. This meant that the chiefs received the giras (mouthful), a fraction of revenue, as payment for buying immunity from attacks. Another name to remember is Batotadar in Jhansi which meant a Thakur's descendant holding land revenue-free.

I need not amplify the various incidents of jagirs which differed from Province to Province. Suffice it to say that the jagirs ranged from that of Nawab of Carnatac confirmed in 1763 by Shah Alam

to smaller jagirs. The Nawab rented the jagir for a lump sum with the result that Hyderali raided it in 1780 but "by 1788 the renters had repeatedly failed and their estates were sequestrated". Similar jagirs were set up in other parts of India and in the Berars. A vast congeries of rules known as the Settlement Rules governed them.

I now come to some other tenures. One that resembled the jagirs was known as Dumala - a Bombay term - which was applied to a revenue-free village. It was really land held free for life or for a term. There were other privileged holders of land. The Mokasa under the Marathas was a remission in Land Revenue devoted to some special purpose or for the benefit of a particular person. Therefore, a Mokasadar was a grantee of the whole or a part of the local revenue for some special purpose on specified terms. In the Malabar area we had the Janmam rights. A janmi was really a landlord. A joint commission was appointed in 1792-1793 and the Report said that "almost the whole of the land in Malabar, cultivated and uncultivated is private property and held by 'jenmum' (janmam) right, which conveyed full and absolute property in the soil.... We find the land occupied by a set of men who have had possession time out of mind."[17]

This statement is countered by Baden Powell.[18] Much literature exists on the origin, development and present stage of the janmam right. But Powell had already written a full account based on the contemporary writings of Logan[19], McLean,[20] A.B. Thompson[21] and Dr. Gundert[22] whom Powell describes as 'the best authority'. A title-deed translated by Logan showed the extend of property and what it

comprised. That included 'good or bad stones, stumps of trees, thorns, roots, stupid, bad, wicked snakes, holes, mounds, hidden treasures, wells and skies, lower world, streams, water-courses etc.' This really was what was said in European deeds as "ad coelum et d'enfers" for the total incidents of possession.

In the Mahratta areas we had the khot ownership. Such an owner was originally a revenue farmer, but later was taken to be a proprietor. There might be a single individual or a family or even mixed (called khichadi, from the dish of rice and dal cooked together!). Ordinarily such rights of free grant under the Mughals which were made in perpetuity including the land, so that the grantee was a free-hold owner, were known to be in milk and the incidence was known as milkiyat (ownership).

This leaves over the grants for religious purposes and other revenue-free grants. Grants for religious purposes were generally a free-hold. The Shrotriyams[23] and Agraharams[24] were grants to certain Brahmins free of land-revenue payment. They were known as Bil-Maqta.[25] They were known also as Debottar when they were in support of a temple, Devi or Siva. In Bombay they were known as Devasthana.[26] Other such grants were known as Brahmottar,[27] Shibottar,[28] Piruttar.[29] The Muslim grants were known as Hazrat Dargah[30] etc.

I shall next describe the Inams and Muafis which were somewhat similar. Muafis were revenue-free holdings. The land belonged to the grantee but he was 'excused' from paying the State's dues

on it, either fully or partially. There was no condition of service to the State but service as kazi etc., was the consideration for the grant. There were many kinds of muafis. In Muradabad, where a large number of Sayyid families reside, the Sayyid grantees became proprietors and the villagers were tenants. In the Central Provinces there were grants of revenue-free plots which were known as Inams. They were made on charitable, religious or some service considerations. The temples held many Inam lands and some kazis were muafidars. The grantees also sometimes went under the name Mokasadars. In the Punjab the muafidars and jagirdars abounded from the days of the Sikh rulers. Although some military service lay at the base of the original grants, by the time the British rule came, the service condition had disappeared but the assignment of revenue continued in view of past political services. Some of the holders were appointed honorary magistrates even as malguzars were also appointed. The Administration Report of 1875-76 discussed fully their role. In the areas round about Delhi the name of the muafis was Istimrari Muqarrari.[31] In Madras we had the Dasabandham which was land free to support irrigation works.

By far the largest number of revenue free grants were the Inams. The Inam Commission of 1858 (16 November) was followed by 32 and 33 Vict C.29 (1869). Some of these Inams were grants of land but some were only grants of Government revenue. In such a case there were three classes of Inams:
(i) not unenfranchised, (ii) enfranchised but liable to jodi or quit rent and (iii) enfranchised, the rent being commuted or redeemed. Baden Powell gives a classification of Inams. I give you a summary of it.

(i) Inams of land i.e. a field, a village or group of villages;
(ii) Jagirs from the days of Muslim rulers, with or without land;
(iii) Grants to Brahmins.

According to the objects and purpose, the Inams are shown by Baden Powell to be of nine kinds:

(1) For religious institutions and services connected therewith;
(2) For public utility purposes such as chatrams, (refreshment stalls) water pandals, maintaining bridges, ponds, tanks etc;
(3) Dasabandham: construction of irrigation works;
(4) For maintenance of Brahmans and other religious persons;
(5) For maintenance of families;
(6) For maintenance of religious persons;
(7) For police;
(8) For Karnams (accountants), headmen or other village officers;
(9) For village artizans.

In so far as the tenants were concerned we get many kinds. There were even tenants of tenants. They often paid their dues in kind. They went under different names such as Adhiyar, Shikmi, Bargait. The payment in kind went under different names, for example, in Berar it was known as batai and in Bihar Bhaoli. Even among proprietors there was sub-infeudation. The Ala-Malik was the superior owner of a village while an Adna Malik was an inferior proprietor. In so far as enjoyment of cultivable land was concerned, the highest grade was known as Sir land. There were three ways in which sir right came about:

(1) If it was recorded as sir in the first settlements;
(2) If it was cultivated by the proprietor for 12 consecutive years; and
(3) If it was originally waste land and was brought

under the plough and cultivated for six consecutive years thereafter.

If tenants were settled on sir land, the proprietor could enhance their rents and even eject them. The next grade of land was Malik Mukbuza. That was land in possession of the proprietor who had full right in the holding but had lost or never had any share in the profits of the entire estate or entire village. Where the land was cultivated by a proprietor for himself in a village estated with co-sharers and he paid rent for the whole body it was known as khudkasht. The meaning however in Bengal and in northern India was different. It is not necessary to go into these meanings.

It remains only to describe to you the Permanent Zamindary Settlement of Bengal which was the precursor of such settlements elsewhere. At first only annual settlements were in force. In 1786 Lord Cornwallis and Sir John Shore came together to India. The latter was appointed to the Board of Revenue. Earlier, Parliament had passed 24 George III Cap.25 in 1784. Under that Act inquiries were to be made into "the jurisdiction, rights and privileges' of Zamindars, Taluqdars and Jagirdars, under the Mughal and the Hindu Governments .... and what they were bound to pay....." As a result, the Board of Directors ordered Settlement for 10 years instead of 'dubious perpetuity'. After more inquiry, on 22 March 1793 Lord Cornwallis declared by Proclamation that the 'decennial settlement' would be permanent and this Proclamation itself became Regulation I of 1793. The assessments so fixed were declared to be unalterable 'for ever' but on failure to pay, the right could be forfeited and sold.

The Regulation also provided that this Settlement was to be made also with Taluqdars and other actual proprietors. The Taluqdars were sometimes 'independent' and some times 'inferior' to Zamindars. If the former they were settled with separately.

The best account of this is in the Tagore Law Lectures for 1874-75 delivered by Arthur Phillips.[32] For those who wish to have first hand material they may read the Fifth Report of the House of Commons of 1812 (Printed in 1866 and 1883 in Madras) and the more easily available Analysis by Harrington (1821, 3 Vols. Calcutta). Powell and other books on Tenures give less detailed accounts. I have not gone into more details because they are now of historical interest only. The Constitution, as we shall see later, has abolished all these tenures. This account shows the kind of agrarian arrangement which the British inherited from the Mughals and which they preserved except for changes in certain details. The great contribution of the British was the Raiyatwari-system on the one hand and Permanent Settlement on the other. I have sufficiently explained them. For us, who lived with these systems, there is nothing new, but after 30 years of the Constitution the new generation must know something about them to appreciate later developments. With this background knowledge, the student will be able to follow the changes that came with time and finally culminated in the provisions of the Constitution. I shall next deal with the position of property rights after the East India Company was ousted by the British Government in the governance of India. Much of what we had seen remained but certain safeguards were introduced till we come to 1950 when the rights so far discussed slowly and by stages disappeared.

1. Dravidians had organised Central Government under Rajas.
   Powell; Land systems in British India, Vol.I,p.118.
2. H.J. Hewitt; Journal of the Society for Arts; May (1887) Vol.XXXV p.613 and Journal of Royal Asiatic Society April 1890, pp.505-7.
3. Cunningham; Ancient Geography.
4. Col. Todd; Annals of Rajasthan.
5. See note 1 above.
6. Arthur Coke Burnell; Ordinances of Manu.
7. Epochs in Hindu Legal History.
8. Sir George Campbell; Essays on Indian Tenures (Cobden Club Papers).
9. Elphinstone; History of India.
10. The Laws of the Primitive Man.
11. Col. Vans Kennedy; Journal of Asiatic Society Vol.II p. 105.
    See also Powell: Land-systems Vol.I p.219
    Powell: (ibid) Vol. I pp. 229-231.
12. Powell (ibid) Vol.I pp. 229-231.
13. Powell (ibid) Vol.I p. 234.
14. Powell (ibid) Vol.III, p. 32.
15. Wilson, Glossary (1968) p. 323.
16. Powell (ibid) Vol.I p. 187 f.n.
17. Powell (ibid) Vol.III. p. 154.
18. Powell (ibid) Vol.III. p.164 et seq.
19. Powell (ibid) Vol.III. p. 164 (1887)
    District Manual et seq. for Dr. Logan.
20. McLean; History, Tenures.
21. Thompson, A.B.; Malabar Law Reports (1887) Vol.II p. 82.

22. Dr. Gundert, Powell (ibid) Vol.III. p.165 f.n.

23. Shrotriyam; Grants given to particular Brahmin families. The term really means one who reads the Vedas (Sruti).

24. Agraharams; Proprietary grants given to a community of Brahmins who might be of different sects. (see Powell Vol.III pp. 80, 119).

25. Means in the lump - It was used by Munro in the Raiyatwari Settlement. Major General Sir T. Munro's part can be gathered from selections from his Minutes with a Memoir by Sir A.J. Arbuthnot, 2 Vols. (1881).

26. Grants in favour of Devasthanas.

27. Land granted rent-free to Brahmins for their support -A reward for sanctity (Wilson's Glossary)

28. A rent-free grant for the worship of Shiva.

29. Assignment of rent-free land for mosque or Muslim religious establishment.

30. A rent-free grant for the upkeep of the shrine (Dargah) of some saint (Hazrat).

31. Means permanent rent.

32. The Law relating to the Land-tenures of Lower Burma (Calcutta, 1876).

LECTURE VII

THE BRITISH PERIOD

L E C T U R E VII

THE BRITISH PERIOD

What we saw in the last lecture was really the distribution of landed estates and the rights and obligations of those who held them. Although we began our study with the early Hindu times and followed them through the time of the East India Company there was never a break in the continuity of proprietorship. The feudal character in which the proprietary rights began, soon changed. Military service and other services fell into desuetude but the proprietorship demand of services continued. The right to enjoy lands, whatever the right in which they were held, was protected like any other right enforceable in a court of law. Some of these rights were recorded in revenue misls (files), some in sanads and some in treaties.[1] In the case of the Feudatory Chiefs and Zamindars who held lands under favourable conditions interference by Government by passing laws abolishing the privileges, was upheld by the Privy Council as within the legislative competence of the Indian Legislature. Thus the provisions of the Land Revenue Act were imposed on the Feudatory Chiefs and the Takoli[2] of the Zamindars, governed by the Chanda Patent, was abolished. Both cases went upto the Privy Council but the stand of the Government was upheld.

There was no guarantee against State action. These recognised rights had no better status than any other right because there was no constitutional guarantee.

The guarantee of rights in private property began from the Government of India Act, 1935. There was no guarantee in a constitutional document before. The territories of the East India Company were formally taken over by the British Crown in 1858 (21 and 22 Vic. c.106) and the Crown also assumed sovereignty over India. Other Constitutional arrangements were made by the Indian Councils Act of 1861 (24 and 25 Vic. c,67). This Act was followed by other Acts of the same name passed in 1869, 1871, 1874, 1892, 1904, 1907 and 1911. Many other Acts were passed by the British Parliament besides these but they need not be mentioned here. Before 1935 the requisition and acquisition of property even for public purposes, was governed not by any constitutional guarantee, but by law.

The first was an Act of the Indian Legislature of the year 1870. Before that Act was passed the valuation of lands so taken over from private persons was done by Arbitrators. The Arbitrators were not only 'incompetent' but sometimes 'corrupt' also, and there was no law to guide them. The 1870 Act was designed to do away with Arbitrations. Under that Act the price to be paid was to be settled by the Collector. If he could not get the private parties to agree to his valuation, he was required to refer the dispute to the Civil Court and if the Judge and one or more Assessors agreed, the decision was final, but if the Judge and the Assessors disagreed, an appeal lay to the High Court. This was unsatisfactory because even a petty difference went to the Court and the cost of litigation that ensued and which fell on the Collector, often was more than the value of the land. The Act was repealed in 1894 and a new Act

was passed. An extract from the Objects and Reasons may be read here:

> "On the other hand the provisions of the Act as to the incidence of costs, the whole of which fall on the Collector, if the final award is ever so little in excess of the amount of the tender, are such as to encourage extravagant and speculative claims. The chance of altogether escaping the payment of costs is so great, that claimants are in the position of risking very little in order to gain very much, and have, therefore, every motive to refuse even liberal offers made by the Collector, and to try their luck by compelling a reference to the Court. Much the same may be said as to the provisions of the law regarding the payment of interest. No matter how fair the original offer of the Collector and how groundless the refusal to accept the compensation he had tendered, interest is payable on the amount of the award finally arrived at from the date of the Collector's taking possession of land..."

The Act of 1894 made the Collector's award final unless altered by a decree in a regular suit. As was said of the claimants in the Objects and Reasons "they will no longer,however, be encouraged to litigate by the feeling that they can hardly lose, but may make a great gain by doing so."

This was the position before the Government of India Act. By this Act [S.20(4)] it was reaffirmed that all property vested in His Majesty under the Act of 1858 shall be applied in aid of the revenues of India. By section 28 power was conferred on the Secretary of State in Council to sell, mortgage, or

otherwise dispose of such property, and also to purchase and acquire any property. Under s.31 new property coming to His Majesty by reason of forfeiture, escheat or lapse or by devolution as bona vacantia, could be re-granted. By section 32 the Secretary of State in Council could sue or be sued and the property of His Majesty was subject to judgments and executions in the same manner as against the East India Company. Under s. 65 the power of the Indian Legislature extended over all persons, all courts and over all places and things in British India. In the Devolution Rules (Part II) item 15 read:

> "Land Acquisition: subject to legislation by the Indian Legislature."

However in Schedule II (Devolution Rules), which contained the list of Provincial subjects for transfer,[3] there was added, on 16 July 1926, item 11-A which read:

> "11-A Notification under sub-section (1) of section 4 and declarations under sub-section (1) of section 6 of the Land Acquisition Act, 1894, when the public purpose referred to in the said sub-sections appertains to a transferred subject, subject to legislation by the Indian Legislature."

Thus the subject of Land Acquisition was a Central subject although the Provinces were enabled to issue notifications under S.11 A above. The scheme of compensation was to make the issue of quantum a justiciable one.

I may point out that the name 'Government of India Act' denotes the Acts of (1915) 5 & 6 Geo.5

Ch. 61 and (1916) 6 & 7 Geo.5 Ch.37 as amended by (1919) 9 and 10 Geo.5 Ch.101, in 1919. It is wrong to call the amended Act Government of India Act as of 1919, a common mistake. It is named without any year.

When the 1935 Act was passed, the Joint Parliamentary Committee was moved to create a Constitutional guarantee against expropriation of private property. How this happened may be stated in their own words. The Chairman's Draft Report had deprecated the idea of including provisions on Fundamental Rights but he stated as follows regarding expropriation of private property:

> "We think also that the expropriation in British India of private property, except for public purposes and on payment of compensation to be assessed by some independent authority, should be expressly prohibited. This would quiet doubts which have been caused in India by certain Indian utterances and would tend to strengthen the forces of law and order."

In the Report the subject was more elaborately considered. This is what was said:

> "We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been aroused by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We

do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor-General or Governor (as the case may be) to its introduction, and in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation."

The Report however said:

"and a cynic might indeed find plausible arguments in the history during the last ten years of more than one country for asserting that the most effective method of insuring destruction of a fundamental right is to include a declaration of its existence in a Constitutional document..."[4]

The Report then went on to consider the special cases of grants of land or of tenure of land free of

land revenue. These, the Report described as 'vested interests'. In relation to these, the Report expressed sympathy, although they felt that they could not contemplate a far-reaching limitation. They recommended that the Constitution Act should contain an appropriate provision requiring the prior consent of the Governor-General, or the Governor, as the case may be, to any proposal, legislative or executive, affecting such privileges.

The Report also considered the Permanent Settlement in Bengal, Bihar and Orissa and parts of United Provinces and Madras which was made at the end of the 18th century. The Report felt that despite the promises of permanence which the Settlements contained, they would be legally subject (like any other Indian enactment) to repeal or alteration. However, a strong check was contemplated by instructing the Governors to reserve for the signification of His Majesty's pleasure any Bill passed by the Legislature which would alter the character of the Permanent Settlement.

As a result, a carefully drafted section 299 was added in the Constitution Act of 1935. This Section followed immediately after sections 297 and 298. Section 297 insured freedom of trade and commerce inter-provincially. Section 298 required that no subject of His Majesty shall be discriminated against on the grounds only of religion, place of birth, descent, colour or any of them. This was made a special responsibility of the Governor-General and the Governors in respect of minorities.

Then followed section 299 which read:

299 (1) No person shall be deprived of his property in British India save by authority of law.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes

part of an undertaking..

The protection which the bill provided to private property in land was extended to commercial and industrial undertakings. This protection was available to any person so long as the property was in British India.

These sections and section 300 have corresponding provisions in our Constitution. Section 300 protects certain rights, privileges and grants and these four sections represent the only safeguards against arbitrary State action. Section 297 is reflected in the Constitution in Part XIII while sections 298 and 299 are reflected in Part III. What section 300 provides will be found scattered in different parts of the Constitution.

Questions arose at first as to the conclusiveness of the Government's statement that a 'public purpose' existed. In India it was laid down in Ezra v. Secretary of State I.L.R. 30 Cal.36 that it was so. In Wijeyesekera v. Festing (1919) A.C 646 the case arose in Ceylon. That was a case under sections 4 and 6 of the Acquisition of Land Ordinance (Ceylon), 1876. In terms those sections were the same as corresponding sections in the Indian Land Acquisition Acts of 1870 and 1894 except that the Indian Acts expressly provided that the Order of the Local Government was conclusive about the declaration that a public purpose existed. Even so, the Privy Council held that the nature of the enactment showed that it was intended that the declaration of the Governor in Executive Council on the existence of the public purpose should not be open to question before the District Court which was charged only with the duty of determining the compensation.

These questions again arose under the writ jurisdiction which the Constitution newly created. We shall see the decisions later.

The Instrument of Instructions to the Governor-General and the Governors contained provisions which were ipsissima verba. That of the Governor-General [Clause XIII (c)] read:

> "Without prejudice to the generality of his powers as to reservation of Bills, our Governor-General shall not assent in our name to, but shall reserve for the significance of our pleasure, any Bill of any of the classes herein specified, that is to say:
> (c) any Bill regarding which he feels doubt whether it does or does not offend against the purposes of ....s. 299 of the Act;
> (d) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement."

It would thus appear that after the assents requisite under the Instructions were accorded there would be an end of the matter. The Government of India Act, 1935, was silent about any remedy which a party aggrieved could have apart from those under the Land Acquisition Act, 1894.[5]

The Government of India Act 1935 had a fifteen year run before the present Constitution came. During this time the Privy Council and the Federal Court were not called upon even once to construe this section or the Instructions. The Land Acquisition Act governed such cases. Indeed two leading cases of the Privy Council came in this period. They were Raja

Vyaricherla Narayana Gajapatiraj v. Revenue Divisional Officer, Vizagapatnam (1939) L.R. 56 I.A. 104 and Babu Kailash Chandra Jain v. Secretary of State (1946) L.R. 73 I.A. 134. These cases bore only on the subject of compensation and how it was to be determined.

In the first case, Lord Macmillan, Lord Romer and Sir George Rankin laid down that land compulsorily acquired must be valued not merely by reference to the use to which it was being put at the time at which its value had to be determined, but also with reference to the user to which it was reasonably capable of being put in the future. That case arose when the Vizagapatnam Harbour Authority acquired lands adjoining the harbour. Situated on these lands was a shallow basin in a valley and it formed the catchment area for the water of a spring. Even in the dry season the spring was yielding 50,000 gallons of excellent drinking water, some 150 feet above sea-level. This water was not being put to any use by the owner and it used to discharge itself into the creek. The harbour site was malarious and the wells which were the source of water for the locality were breeding grounds for malaria-bearing mosquitoes. The wells had to be closed and other supply of water had to be obtained. The spring ideally answered this need and was expected to be of considerable utility to oil companies and other industrial concerns likely to be established near the harbour. To use this water all that was necessary to do was to construct a tunnel and divert the water to the harbour area. About 109 acres of land were, therefore, compulsorily acquired. The question of compensation was taken up under sections of 23 and 24 of the Land Acquisition Act, 1894. These sections closely followed the Land Clauses Act of 1845 in England before the Acquisition of Land (Assessment of Compensation) Act of 1919.

In laying down the law the Judicial Committee observed that neither the buyer nor the vendor must be considered as acting under compulsion and the price must be the price a willing vendor would expect to obtain from a willing buyer. It was not the price that would be paid by a 'driven' buyer to an 'unwilling' vendor. The potentiality of the land for lucrative future use must be considered. Where the land had the unusual features or potentialities the valuing officer, must ascertain as best as he can from the materials before him the price a willing purchaser would pay for the land with these features or potentialities. The owner was entitled to, and the valuing officer must, ascertain the value of the potentialities even when the only possible purchaser of the potentialities, was the authority purchasing under power enabling compulsory acquisition. Lord Romer emphasised that the land was essential for anti-malarial works and the authority needed the land for the purpose, and based his decision on the principles contained in section 23 of the Act and took assistance of certain English and Scottish cases but did not refer to a single case decided earlier in India or by the Privy Council itself, although quite a few were cited at the Bar. There was in fact Narsingdas v. Secretary of State (1924) L.R. 52 I.A. 133. There the valuation was to be based on the actual condition of the land with all its existing advantages, excluding any advantage due to carrying out of the schemes for which it was acquired. This was affirmed in Nouroji Rustamji Wadia v. Bombay Government (1952) L.R. 52 I.A. 367.

The principle of compensation as determined by the Privy Council in this case may be stated in

a few simple words. The main determinant factor was the market price which could be found if lands of similar kind and situation were sold by private treaty earlier and the price paid was ascertainable. Even this fact was not held decisive. It was laid down that not only should the present use determine the price but also the potentiality of its use in future was to be considered and even considered in cases where the only possible purchaser was the only person who could avail himself of this potentiality.

In the second case Babu Kailash Candra Jain v. Secretary of State (1946) L.R. 73 I.A. 134, the application of wrong principles of valuation giving rise to injustice and thus leading to interference by the higher authorities under the Land Acquisition Act was gone into. That case turned on the provisions of section 23 of the Land Acquisition Act as amended by the United Provinces Town Improvement Act, 1919. In that case Lord Macmillan, Lord Wright, Lord du Parcq, Martin L.J. and Sir John Beaumont were compelled to leave out future potentialities because the amendment had removed them from consideration. Their Lordships observed that of the present use of the land could be considered for the purpose of arriving at the market value.

These cases lay down in detail the principles to be applied to all cases of compulsory acquisition of land for public purposes, but, it may be noted, only within the scheme of the Land Acquisition Act, 1894,both before and after its amendments by State Legislatures. The sum total thus was that the principles had to be gathered from the Land Acquisition Act, and all rights and remedies arising from within that Act. Room was left for special laws to be passed, either providing a stated compensation

for the property, or for fixing the principles on which, and the manner in which, it was to be determined. Therefore, either the acquisition had to be under the authority of the Land Acquisition Act, with all its limitations and remedies, enforceable according to the tenor of the Act, or under a special law, if the Land Acquisition Act was not to apply. That law had to be self-contained as to compensation and the principles on which it was to be calculated. The remedies would also be included in that law and could only be enforced according to the provisions thereof. Any executive act which could not be justified in these two ways was likely to be questioned, presumably by a suit, because there was no other remedy available in the Constitution Act.

When the Government of India Act, 1935 was enacted many writers commented on section 299. Rajagopala Iyyangar (later Mr. Justice) dealt with the question of compensation with reference to the question whether the compensation should be full or what. He drew attention to the case of Chicago Railway Co., v. Chicago (166 U.S. 226) where a dollar compensation was held to satisfy the just compensation requirement.

We know that there were many tenures, many landholders of various degrees, protected by different settlements, grants and other documents.[6] The question before the Constituent Assembly was: "What was to happen to them under the Constitution to be framed." In the Government of India Act, 1935 in section 299(3) the interests of Jagirdars, Maguzars, Taluqdars were protected especially where

there was a Permanent Settlement. The Joint Parliamentary Committee envisaged that an Instrument of Instruction issed to the Governor-General and a similar one to the Governor would meet the case. In para 372 of the Report it was said:

> "... We feel that the Permanent Settlement is not a matter for which, as the result of the introduction of Provincial Autonomy, His Majesty's Government can properly disclaim all responsibility. We recommend, therefore, that the Governor should be instructed to reserve for the signification of His Majesty's pleasure any Bill passed by the Legislature which would alter the character of the Permanent Settlement."

The activity which led to the abolition of the feudal estates in India began even earlier than our Constitution. This activity began in 1948 and was designed to give effect to the social justice plans which were to be embodied later in the Constitution. The abolition of these feudal rights and many contracts was challenged in Courts, but with what results, we shall see presently.

When the Constitution was being drafted the question of property and its compulsory acquisition or requisitioning for public purposes was before the Constituent Assembly. The choice was whether to make property rights subject to law or to treat them differently. The reason for the changes from the position under section 299 of the Government of India Act, 1935 must be fully investigated first and I proceed to do this.

The Constitution of India Bill 1895 (8 May) also called Home Rule Bill was the first Indian

attempt to prepare a draft of a suggested future Constitution of India. There is some doubt about the authorship. It goes under Mrs. Annie Besant's name but perhaps the driving force behind it was Bal Gangadhar Tilak. It is nothing more than a set of 111 clauses with a short preamble, arranged in nine chapters. The first six are preliminary clauses dealing with name etc., and the remaining 105 clauses deal with the Constitutional arrangements. Clause 23 reads:

> "Every citizen shall enjoy right of property to its fullest extent, except where the law determines otherwise."

The next mention of property rights came in the Nehru Report of 1928. It was in different parts with sub-headings. Under the sub-heading 'Fundamental Rights', clause (4)(ii) reads:

> "(ii) No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestrated or confiscated, save in accordance with law.

You will wonder why I am going so far back. Let me explain. The wording of these clauses discloses the extent to which protection was to go. In the Home Rule Bill of 1895 the right was enjoyable to the fullest extent except where the law determined otherwise. In the Nehru Report the Fundamental Right character was emerging. Property was to be protected against sequestration and confiscation and was not to be entered. The expression "dwelling" was joined with "property" because of the English rule that every man's house is his castle.

The Constitutional Adviser to the Constituent Assembly, (Sri B.N.Rau) in his preliminary notes on

Fundamental Rights saw the difficulty of reconciling freedom as a fundamental right and freedom cut into by the State for public good. He said:

> "The difficulty is in defining the precise limits in each case (of a fundamental right) and in devising effective protection for the rights so limited. Some of the Constitutions have attempted to define the limits of some of these rights and in so doing have gone far towards destroying them. As an example, we may take Art.153 of the German Constitution, which runs: 'Property is guaranteed by the Constitution. Its extent and the restrictions placed upon it are defined by law. Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation save in so far as may be otherwise provided by a law of the Reich'."

It is interesting to see the comment of the Constitutional Adviser. He said:

> "In otherwords, rights of private property are said to be inviolable except where the law otherwise provides, which means that the rights are not inviolable."

The Fundamental Rights Committee had several members. An Advisory Committee was set up and also a sub-committee on Fundamental Rights. Many notes were submitted to the sub-committee. Sir Alladi Krishnaswamy and K.M. Munshi went by the American precedent which says: "No person shall be deprived of his life, liberty or property without due process of law." However, in Article X where the right to property

was dealt with it was said in the description of the right:

> "(4) Expropriation for public uses only shall be permitted upon condition determined by law and in return for <u>just and adequate consideration</u> determined according to principles laid down by it", (emphasis added).

I request you to bear in mind the words 'just and adequate consideration', as a condition precedent. The principles which were to be laid down also would determine, not an unjust or inadequate consideration, but, just and adequate consideration. This was the thinking on the subject of acquisition and requisitioning.

In the discussion it was noticed that if sub-clause (4) were included as a Fundamental Right, 'tenancy legislation which takes away certain rights from landlords and transfers them to tenants, without payment of compensation may become invalid except on payment of compensation which the court regards as just.' It was apprehended that this would go further than the Government of India Act, 1935. This move did not succeed and by a majority of 5 to 2 the clause was retained with the words 'just' and 'adequate'. However clause (4) was recast again to make it applicable generally and in its final shape it read :

> "No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking shall be taken or acquired for public use unless the law provides for payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which compensation

is to be determined."

This was the form on 28 March 1947 and was the same after the deliberations on 31 March 1947. At the same time consideration of what is Article 19(1)(6) now, also went on. That Article then bore number 8 and clause (e) combined the clauses on residence, property and occupation into one. The Drafting Committee later split (e) into (e) (f) and (g) and numbered the clause as 15. Clause (4) was numbered 24. The revised draft of November 1949 had article 19(1)(f) as it was ultimately passed. Clause 24(1) became Article 31(1). Before the final shape clause 24(1)(2)(3) read:

"24 (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable including any interest in or in any Company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles, on which, and the manner in which, the compensation is to be determined and given.

The Drafting Committee said as follows, regarding clauses (4) (5) and (6):

"We have recast clauses (4) (5) and (6) of this article but no change of substance has been made therein, except in clause (6). Clause (6) has been expanded to cover certain laws relating to evacuee property passed by

the Central Legislature within 18 months before the commencement of the Constitution."

Revised draft of clause 19(1)(f) had sub-clause (5) added to the following effect:

"(5) Nothing in sub-clause (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making or imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the Scheduled Tribes."

The third reading took place on 17 November, 1949. The Constitution was adopted on November 26, 1949. In the final shape the clauses of Article 31 read:

"Art.31(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable including any interest in or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(Clauses (3) to (6) omitted here as they remained the same).

It may be noticed that the words 'just' and 'adequate' were finally dropped from 31(2). The only safeguard was the President's assent. The die was cast, the Constitution guaranteed compensation or the principles on which the compensation was to be determined. It also made the right of property a Fundamental Right which meant that remedies for the enforcement of Fundamental Rights guaranteed by the Constitution were available. The Courts had a say in what was meant by these provisions of the Constitution. I summed up the position in Golak Nath v. State of Punjab[7]:

> "Several speakers warned Pandit Nehru and others of the danger of the second clause of Article 31, but it seems that the Constituent Assembly was quite content that under it the Judiciary would have no say in the matter of compensation. Perhaps the dead hand of S.299 of the Constitution Act of 1935 was upon the Constituent Assembly. Ignored were the resolutions passed by the National Planning Committee of the Congress (1941) which had advocated the cooperative principle for exploitation of land, the Resolution of 1947 that land with its mineral resources and all other means of production as well as distribution and exchange must belong to and be regulated by the Community, and the warning of Mahatma Gandhi that if compensation had to be paid we would have to rob Peter to pay Paul! In the Constituent Assembly, the Congress (which wielded a majority then, as it does today) was satisfied with the Report of the Congress Agrarian Reforms Committee 1949 which declared itself in favour of the elimination of all intermediaries between the State and the tiller

and imposition of prohibition against subletting. The Abolition Bills were the result. Obviously the Sardar Patel Committee on Fundamental Rights was not prepared to go far. In the debates that followed, many amendments and suggestions to alter the draft article protecting property, failed. The attitude was summed up by Sardar Patel. He conceded that land would be required for public purposes but hopefully added: "not only land but so many other things may have to be acquired; and the State will acquire them after paying compensation and not expropriate them."

We shall next see in the next lecture how the Courts interpreted these provisions and how Parliament reacted to the judgments.

---

1. Aitchison, C.U: Collection of Treaties, Engagements and Sanads Vols. 1-14 - All Sanads and Patents are included with treaties and other Engagements.

2. Prior to the Government of India Act, 1935 the Feudatory Chiefs questioned the application of the Land Revenue Laws to them on the ground that they could not be made subject to them because of the Engagements with them. They lost in the Privy Council. In 1937 the Taluqdars of Oudh questioned the legislative powers of the Provincial Legislatures in view of their sanads relying upon section 3 of the Crown Grants Act. Under section 99 of the Government of India Act the Provincial Legislatures had power to make laws for the Provinces under item 21 of List II. At that time Professor Holdsworth opined that the only bar was that the consent of the Governor should be obtained but expressed the doubt whether the Crown Grants Act bar could come into play after the sanction of the Governor. They lost in both the Federal Court and the Privy Council. In 1944/45 the question of Takoli arose. There was a grant to the Zamindars of Takoli under the Patents, of a remission in the land revenue payable by them. An Act of the Central Provinces and Berar Legislature abolished this concession. This case was carried to the Privy Council but the Zamindars lost.

3. Devolution Rules (Schedule II) Transferred subjects were opposed to Reserved subjects. Those which the elected ministers were handed over became the transferred subjects.

4. Para 366 page 215 Vol.I of the Report.

5. See the opinion of Prof.Holdsworth in note 2 above.

6. In an earlier part of this lecture, the term misl (file) was used to denote comprehensively all the revenue documents, private agreements which were recorded in Revenue Departments in appropriate files.

7. A.I.R. 1967 S.C. 1643 at 1710.

L E C T U R E VIII

THE CONSTITUTIONAL AMENDMENTS

L E C T U R E VIII

THE CONSTITUTIONAL AMENDMENTS

In my last lecture I showed how much care was bestowed by the Constituent Assembly on the subject of right to property. After preparing several drafts the final form of the provisions was settled. These provisions were two sided. On the one side rights in private property were included among the seven Rights to Freedom enumerated in article 19. The relevant provision there read:

> 19(1) All citizens shall have the right
>
> x x x x x x x x x x x x x x x x x x
>
> (f) to acquire, hold and dispose of property.

In that article sub-clause (5) contemplated restrictions on the exercise of these rights only by law in the interest of the general public or any of the Scheduled Tribes. Property, therefore, became one of the Fundamental Rights subject to the restrictions envisaged by the fifth sub-clause just now noticed. Then followed the other side, in Part III a sub-chapter headed "Right to Property". Originally it consisted of Article 31 and I quoted the operative part of that article in my last lecture. The first sub-clause of article 31 made it a condition that no person would be deprived of his property except by authority of law and the second sub-clause required that compensation would be paid to him for loss of his property.

Having thus established the right and the conditions for its enjoyment, the Constitution by Article 13(2) ordered that "the State shall not make any law which takes away or abridges the

rights conferred" by Part III (which included Art. 19(1)(f) (quoted above) and sub-clause (5) and Art. 31(1)(2)) and that "any law made in contravention of this clause shall, to the extent of the contravention, be void."

Strict obedience to Article 19(1)(f) and (5) and article 31 was thus absolutely necessary if the law was not to be void wholly or partly. Next the Constitution contained a guaranteed remedy for the determination of the question of the validity of laws in the light of the provisions of which strict compliance was necessary. That remedy was placed in Article 32. The first sub-clause stated:

> "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed,"

and the fourth sub-clause said further:-

> "The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

The Supreme Court was given the power to issue writs to enforce the Fundamental Rights.

The position may be summed up: the guarantee of the property rights was there, the consequences of the breach of the guarantee were clearly stated and the remedy itself was guaranteed. Even the Court's power could not be suspended arbitrarily. The High Courts were also given cognate powers but the provisions were only enabling and did not erect a guarantee. We need not concern ourselves with the provisions relating to the High Courts because what could be done by the High Courts, could be done by the Supreme Court.

If the Constituent Assembly thought that by not using the words 'just' and 'adequate' (which in some earlier drafts had qualified the word compensation), interference from Courts would be avoided, they were much mistaken. The problems arose almost at once in two cases. The first case was in relation to the Bihar Land Reforms Act, 1950. The Patna High Court in Kameshwar Singh v. Bihar (later reversed in Bihar v. Kameshwar Singh[1]) applied article 14 to strike down the Act. The decision of the Patna High Court, with due respect, was so patently wrong that no useful purpose will be served by discussing it. Mr. Seervai rightly remarks "the unexpected happened".[2] There was great hurry in moving an amendment without waiting for the Supreme Court's decision. Perhaps the hurry was justified because of the second case. In Bela Banerjee v. West Bengal,[3] the Calcutta High Court, and on appeal the Supreme Court,[4] held that 'compensation' in Article 31 meant 'true equivalent', that is to say, full value. The case involved the Constitutionality of the West Bengal Land Development and Planning Act, 1948. It was a pre-constitution Act having been passed on 1st October, 1948. It fell, not within the second sub-clause of Article 13 but the first, which rendered void, laws in force, to the extent they were inconsistent with the provisions of Part III. The whole Act was not declared ultra vires but two parts of section 8 were so declared. They were the provisions which made conclusive the declaration of the public purpose by Government, and the limiting of compensation to the market value of the land as on 31 December 1946, which was 21 months before the date of the Act (1 October 1948.).

The case bristles with concessions by the Attorney-General. He conceded that the public

purpose was not a matter for subjective determination and the provision about conclusiveness of the declaration by Government was ultra vires. He however tried to save the provision by recourse to sub clause (5) of Article 19. We need not consider this aspect. The Privy Council had said differently.[5]

On the second point also the Attorney-General made a concession. He conceded that the word 'compensation' taken by itself must mean a full and fair money equivalent, but urged that in the context of Article 31(2) read with entry No.42 of List III of the 7th Schedule, the legislative determination must prevail. It is obvious that the preparatory material, namely, the various drafts, was not relied upon as was done by the Privy Council in a Canadian case, to show how the Constitution was framed.[6] The learned judges held that even the provisions of Article 31(2) read with Entry 42 required that compensation must be a just equivalent. Here again the learned Attorney-General made a concession which is described in these words:

> "Whether such principles take into account all the elements which made up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court. This, indeed, was not disputed." (emphasis added).

The Court held that the fixing of the market value as on 31 December 1946 as the maximum compensation payable, offended Article 31(2).

These two cases led to the First Amendment of the Constitution. The amendments were in many directions. They were:

(1) Insertion of Article 31A retrospectively from 26.1.1950.

(3) Insertion of a 9th Schedule containing a list of 13 Act of the State Legislatures.

Article 31(A) saved any law which provided for the acquisition by the State of any 'estate' or any rights therein or for the extinguishment of or modification of any such rights and they could not be deemed to be void on the ground that they were:

(a) inconsistent with or

(b) took away or

(c) abridged a Fundamental Right.

The word 'estate' was defined to cover anything which that term or its local equivalent would include and also to include jagir, inam or muafi or other similar grant. Next the expression 'rights in relation to an estate' was said to include all rights from those of the proprietor down to those of the tenure holder. This article was made retrospective from 26.1.1950.

A new article 31-B was included which, read with Schedule 9, validated 13 Acts and Regulations. They were 'not to be deemed void' or 'ever to have become void' on the ground that they took away or abridged the provisions of Part III on Fundamental Rights, and no judgement to the contrary was to prevail. Schedule 9 mentioned the titles of the 13 Acts, saved from the onslaught of Part III.

These provisions silenced not only the Courts but emasculated Article 13(1) and (2). Even if any of the Acts had driven a coach and pair through the Fundamental Rights guarantees, it could not be questioned and if it was in fact unconstitutional, it became constitutional. I have said before, and I say it emphatically here, that this was not an amendment of the Constitution but a frustration

of the Constitution. Further to make the change retrospective was to forget the distinction been a Constitution and a law. A Constitution on being adopted becomes a historical fact which remains unalterable till the day it is altered and then it can be altered only prospectively. A legislative enactment is only a legislative fact. It does not become a historical fact, bound up with the Constitutional history of the people. A legislative fact can be altered presently, prospectively or retrospectively. Historical facts can be changed, but only prospectively. Further to give support to unconstitutional Acts of another legislature against the Constitution itself, when Parliament could not have itself enacted such a law, was not an amendment. I am not aware of any Constitution which has attempted retrospective amendments (except making slip orders) to protect legislation offensive to itself. Article 31-B read with the 9th Schedule attempts this and that too after Article 368 had come into force. The action was taken by the Provisional Parliament under certain modifications in the language of Article 368 by a Presidential Order to be presently mentioned.

The validity of the Constitutional (First Amendment) Act was questioned before the Supreme Court in Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 458. This case became a land mark in the Constitutional history of India. There were nearly two dozen counsel to assist the Court. The judgement of the Court (which was unanimous) was delivered by Patanjali Sastri J. (later C.J.) on 5th October 1951. The learned judge, at the head of his judgement, summarised the arguments at the Bar made by Counsel challenging the Act. Briefly

stated the points made by the contending counsel were:

1. That the power of amendment was conferred on the two Houses of Parliament by Art. 368 and the Provisional Parliament was, therefore, not competent to act having only a single House.

2. The powers conferred by Art. 379 on the Provisional Parliament could only refer to such powers as were capable of being exercised by the Provisional Parliament consisting of only one chamber.

3. The Constitution (Removal of Difficulties) Order No.2. made by the President on 26.1.1950 adapting Art. 368 by omission of certain words and replacing them by others was in excess of the powers granted for the Removal of Difficulties. Such difficulties could not have arisen simultaneously with the enactment of the Constitution because no difficulty had then arisen.

4. Article 368 did not provide for amendments during the passage of the Bill but the amendments were suggested and accepted, which was not permissable.

5. The amendment fell within the force of Article 13(2) and was thus void.

6. Articles 31 and 31-B required ratification of at least half the States because the protected Acts related to matters which were in the State List.

The Supreme Court rejected all these contentions and upheld the amendment of the Constitution. The Supreme Court, however, refrained from expressing an opinion on the latter part of Art. 31-B as the point was not argued before the Court. These

points were all rejected for reasons given in the judgement.

As the matter has gone beyond Shankari Prasad's case in many subsequent cases, no purpose will be served in exegetically examining the reasoning. Certain points were not mooted and they would have had some effect. The Supreme Court went by certain reasoning which was sometimes contradictory. There were, many assumptions which were rejected when a a different point was considered.

The Court considered these arguments in the same order and it is convenient to do the same here. The Court rightly pointed out that the constitution provided for three different classes of amendments. I think the more accurate way to describe this is to say that the Constitution lays down three different procedures for amendments. The first mode is in Articles 4, 169 and 240 where the Constitution can be changed by a law passed in both the Houses by a simple majority. This mode is stated to be not an amendment of the Constitution. It is an amendment all right but is said to be not so, to avoid the implications arising from Art. 368. Perhaps the proviso could have been worded better. The second mode is that the amendment should be moved as a Bill in one of the Houses and then it should be passed by two thirds majority of the members present and voting and more than half the membership of the Houses. The third mode is that the amendment of some articles, after acceptance of the amendments under the second mode, should receive ratification of at least half the States.

While the Provisional Parliament sat, the second mode could not be literally followed because there was only one House and not two. The President

therefore, by his Order removed from Article 368 all words referring to the two Houses leaving the expression Parliament as the place where the Bill was to be moved and passed by a two thirds majority. The question that arises in my mind is whether the Presidential Order can be described as an order to remove difficulties. Difficulty there was none except that the Provisional Parliament did not fit in the scheme above described. But that was hardly a difficulty. After the first election, the article could be complied with but not before. There was no hurry to negative the Patna decision or for that matter the Bela Banerjee case. The first was in fact overruled by the Supreme Court and an early hearing would have ensured stay of the judgement. There were other High Courts which had already dissented from the Patna view. So strictly speaking there was no difficulty nor even urgency. But the amendment was moved before the Provisional Parliament and passed.

Much argument was made on the question of the effect of the Presidential Order but nothing was said about its validity. Indeed the power of the President should have been questioned. The ground of attack should have been that the President had not removed difficulties but had laid down a new Constitution. A glance at the scheme of Article 368 will show that the voting on the amendment bills for amending the Constitution is from two very different bodies of men. The Lok Sabha is composed of representatives directly elected by the people, the Rajya Sabha is composed of persons elected indirectly by the Legislative Assemblies in the country and thus there are as many Constituencies as there are States. The two Houses thus have very distinct party alignments.

majority it does not necessarily ensure a similar vote in the Rajya Sabha. The party strengths and alignments in the two Houses lead to quite different results as was demonstrated in the famous Privy Purses[8] case. The Constitutional Amendment was passed by the Lower House but was rejected by the Upper House. This proved conclusively that one House did not control the other and the rules applicable to ordinary legislation do not apply.

Therefore, it stands to reason that the Constituent Assembly advisedly framed the four-fold checks on Constitutional amendments other than those which required no special majority. These checks were (1) special voting in Lok Sabha (2) Special voting in Rajya Sabha, (3) ratification by half the States in certain cases and (4) assent of the President.

What the President did, was not a removal of difficulties. On 26 January 1950, article 368 came into force and so did the Presidential order. The only difficulty was that Article 368 had to wait till the elections brought in the two Houses. But the Supreme Court was there and could have been invited to stay the effect of the Patna High Court judgement while the elections were to be held. What the President did was in effect to make a new Constitutional Provision for amendments and that change made the article 368 inapplicable and a new article took its place. In a word it was making a Constitution and not removing any defect in the Constitution, as passed.

Counsel made no attempt whatever to question the vires of the Presidential order on the ground that the power exercised exceeded the power granted.

In fact it was Constitution making and not removing difficulties. The President kept the two thirds majority provision. He might well have removed that and made a plain majority the basis of amendment and made article 368 bear affinity to what can be done under Articles 4, 169 and 240. Even that the Supreme Court would have upheld, because their Lordship reasons given in the judgement would have covered even that drastic step without change.

Further it should have been seen that the Constituent power really belongs to the people. They part with it to their representatives but while doing so control their actions. The Constituent power was parted with in Art. 4, 169, 240 and 368 but in different ways. The people did not part with their Constituent power to the President. They only gave him power to remove difficulty which is a very different matter. I shall show that even the constituent power transferred was hemmed in by different provisions in different contexts. We shall soon see whether Art. 13(1) and (2) did not also control the exercise of the constituent power parted by the people. That is a different subject but its discussion will strengthen the reasoning so far employed by me. Counsel unfortunately did not raise these points before the Supreme Court and, therefore, the matter was never considered from this angle.

Having said this I now take you to the arguments urged by Counsel and the decision of the Court on those arguments. In dealing with the argument that the Presidential Order was without jurisdiction the Court brushed aside all arguments by observing that the phrase 'any difficulty' was a wide expression and could not be circumscribed.

The Court observed:

> "It is true enough to say that difficulties must exist before they can be removed by adaptation, but they can exist before an occasion for their removal actually arises."

The long and short of the reasoning was that the article was all right by itself but it could not be used for giving power to the Provisional Parliament because of the language of Art. 368, so the difficulty must be removed to fit the article in the situation created by Art. 379. The Court also observed that there was nothing in the article to suggest that the President should wait till an occasion arose for Provisional Parliament to exercise the power under Art. 379. The Court further remarked:

> "The adaptation leaves the requirements of a special majority untouched."

It was not noticed that there were two separate and independent Houses contemplated and that there was not even a provision of joint sitting because a joint sitting could not take place when the House was only one. The arguments with which I began may be considered to see if Art. 368 could be so modified as to destroy the entire scheme of that article and whether the removal of difficulties did not make a new Constitutional provision which had nothing to do with the original Constitution.

The most vital argument about article 13 was brushed aside by saying that a legislative power was different from constituent power. No doubt it is so but it was not given to the Provisional Parliament or the President to create constituent power in a body to which that power was never entrusted. Here I may say that in a State the constituent power belongs to the people and only

by their representatives as the people choose to confer on their representatives. There is no general constituent power in Parliament apart from what has been conferred on it by the Constitution or in other words by the people. The so-called constituent power is what is to be found within the four corners of the Constitution. Thus the exercise of constituent power under Articles 368, 4, 169 and 204 and even within Article 368 is of varying shades. While exercising the power under article 368 Parliament is bound to look at the other parts of the Constitution to see if the power is either enlarged or curtailed. Articles 4, 169 and 204 enlarge the power. The question is whether Article 13 puts the power under any constraints. Quite apart from the fact that under Article 368 not only the people's representatives directly chosen have one say, the representatives of the State Assemblies have an independent say, Article 13 makes laws to be made subject to the Fundamental Rights. The Court did not accept the contention that Article 13 or in other words the Fundamental Rights have to be observed when an amendment is made. This was done by saying that the making of the amendment is an exercise of constituent power. Having in an earlier part made it a legislative process, it was difficult to deny to the First Amendment Act the name of a law. Curiously enough counsel for the contenders denied that the procedure under Article 368 was a "legislative procedure". The Court said that it was.

Having said this the Court tried to make a distinction between law made in the exercise of legislative power and constitutional law made

Court then said:

> "We find it, however difficult, in the absence of a clear indication to the contrary, to suppose that they also intended to make rights immune from constitutional amendments.... Had it been intended to save the fundamental rights from the operation of that provision (i.e. art.368), it would have been perfectly easy to make that intention clear by adding a proviso to that effect."

It is here that Article 13 has to be read and the definition of law as given there seen. After saying that any law which takes away or abridges the rights conferred by the chapter on fundamental rights, 'law' was defined thus:

> "Law" includes any ordinance, order, bye-law, rule regulation, notification, custom or usage having in the territory of India the force of law."

It would have been equally simple to add here:

> "but shall not include a law made under Art. 368 in the exercise of constituent power of that article."

Probably this would have been simpler. The definition does not leave out any aspect of law making but only includes subordinate legislation. The argument based on the absence of a proviso in Art. 368, excluding fundamental rights, is answered by the absence of any exclusion whatever in the definition of Law in Article 13. Indeed when the Constitution (24th Amendment) Act was passed a sub-clause was added which was decisive:

> "Nothing in this article (i.e. Art.13) shall apply to any amendment of this Constitution made under Article 368."

As if any doubt still remained, Article 368 was amended by including:

"Nothing in Article 13 shall apply to any amendment made under this article."

Although I dissented from Shankari Prasad's reasoning I did not attempt to overrule it when occasion arose, but I was unable really to discuss it. I am now able to say that the four approaches to the six arguments of the contenders do not bear close scrutiny. The first made article 379 equally applicable to ordinary legislation and amendments to the Constitution. Both were characterised as legislation. Next after conceding that Article 368 was not a code (whatever this meant in this context) and also thus conceding that other parts of the constitution could be read with it, it was said that a Constitutional amendment was not 'a law' within Article 13. This was so said because Article 368 was not made subject to Article 13. I have shown that all this was hardly convincing and the contrary arguments were equally forceful.

It is convenient to pause here and take stock of the powers resulting to Parliament (whether Provisional or Regular), as a result of this decision of the Supreme Court. Parliament could, thereafter amend any provision of the Constitution (including the entire chapter on Fundamental Rights). It could undo any and all the guarantees so carefully and sedulously incorporated by the Constituent Assembly. This followed from the declaration that the constituent power was not circumscribed at all. The next accession of power was that Parliament could amend any part of the Constitution (including the chapter on Fundamental Rights) retrospectively. Next power was obtained to establish that the most

blatant breach of the Constitution (and including, of course the Fundamental Rights), whether so held by the Supreme Court or not, could be protected against the Constitution itself, by the simple 'device' of putting only the name of the offending statute in the Ninth Schedule to the Constitution. Lastly no statute so included could be called into question ever afterwards in any Court of law and if the Courts had already held it to be void, the judgement became ineffective and the statute became Constitutional. Now let us examine the implications.

You remember that Dicey once wrote in his book on the English Constitution that the British Parliament was so paramount that if it passed an Act that all blue-eyed babies be put to death, all such babies would have to be killed till another Parliament repealed the law. In our country even if all the members of the two Houses of Parliament and all the members of all the Legislatures of the States passed such a law unanimously and the President and the Governors, assented to this outrageous Bill, the Courts would strike down the law as void. But if Parliament by two thirds majority in both Houses of Parliament enacted this as an amendment in the Constitution and the President assented to this inhuman law (as he will now be bound to do) the massacre of the blue-eyed babies would have to begin. The Courts will be powerless to do any thing in this behalf thanks to Shankari Prasad's case. It is no use saying that such things will never be but substitute for blue-eyed babies whatever right you like and the result would be the same.

Next there is the concession that retrospective amendments of the Constitution are within

contradict the very nature of a Constitution. You may amend a Constitution to your heart's content but you cannot sit in the chair of the members of the Constituent Assembly and erase what they did. A Constitution must stay as it is till it is changed but it cannot be changed from an earlier date. If this is done it ceases to be a Constitution and becomes a municipal bye-law. Grant this power and all religious freedom, equality, protection against double jeopardy etc., are not worth a straw. They will be at the mercy of political whims and the whole of Article 20 may be undone by an amendment. Indeed when Act 21 was suspended, no less a person than the Attorney-General was heard to say that the lives of the citizens of our country were unprotected and he got support for his views at least in respect of personal liberty from the Supreme Court in a later case. The blue-eyed babies and all others were in peril!

In so far as the protection of offending statutes was concerned, the 'device' of keeping away offending statutes from judicial scrutiny was resorted to again and again by what can only be called a Constitutional amendment by courtesy because they were included in the Ninth Schedule by just naming them. The expression 'device' may appear discourteous but the Objects and Reasons to the 39th amendment Act so described it. This is what it said:

> "Recourse was had in the past to the Ninth Schedule where ever it was found that progressive legislation conceived in the interests of the public was imperilled by litigation. It has become necessary to have recourse to this device once again now."

The First Amendment Act had only thirteen such Acts, the Fourth Amendment Act added another seven, and section 5 of that Act read:

> "In the Ninth Schedule to the Constitution after entry 13, the following entries shall be added --"

It was as simple as that. The sixteenth Amendment Act with the same simple formula, added another forty four Acts, without specifying any grounds for protection, bringing the number to sixty four. The Twenty Ninth Amendment Act was modest. It added only two more, but the Thirty Fourth Amendment Act added no less than twenty and the score now was eighty six. Then came the 39th Amendment Act which raised this score to 124, and the Fortieth Amendment Act which took the figure to 186. Then this process stopped because the Ninth Schedule threatened to become longer than the Constitution itself and offered to absorb all legislation which might be questioned.

Mean while many things happened to Article 31. Already Articles 31-A and 31-B had been added. The Fourth Amendment Act modified clause 2 of Article 31 and added a new clause 2.A. A new Article 31-A was substituted for the old one and it was to be 'deemed always to have been substituted.' That removed the attack under Articles 14, 19 and 31 to what was specified there. The Seventeenth Amendment Act added a second proviso to Article 31-A, and brought, as stated earlier, forty four enactments under the umbrella of Article 31-B and the Ninth Schedule. This Amendment Act was questioned twice before the Supreme Court and each time I was a member of the Constitution Bench. The first time it was challenged in Sajjan Singh v. Rajasthan A.I.R. 1965 S.C. 845. Before I deal with that case

"31B. Validation of certain Acts and Regulations: Without prejudice to the generality of the provisions contained in Article 31A none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgement, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

Article 31-B was inserted by the First Amendment Act. Article 31-A which was simultaneously inserted underwent a change. The original insertion was from 26.1.1950 by section 4 of the First Amendment Act 1951 but in 1955 by the Fourth Amendment Act a new clause (1) was retrospectively substituted for the old one and clause (2) was enlarged to take in some more kinds of property. That I indicated earlier today. What the changes were appear very clearly from 'Objects and Reasons' at the head of the Constitution (Seventeenth Amendment) Act. They read:

"Article 31A of the Constitution provided that a law in respect of acquisition by the State of any estate would not be deemed to be void on the ground that it was inconsistent with Articles 14, 19 or 31. The expression 'estate' had been defined differently in different States. As a result of the transfer of land from one State to another under the scheme of re-organisation of States

tations even in parts of the same State. The present Act, therefore, modifies the definition of 'estate' in article 31A and amends the Ninth Schedule by including therein certain State enactments."

That meant that on the 26th of January 1950 that Article had no less than three faces, each face succeeding another, the previous one disappearing like the face of the Cheshire Cat, leaving only its grin behind. Is this, I ask you, power of amendment?

The Supreme Court in Shankari Prasad's case did not express its opinion on the validity of Article 31-B (latter part) because this aspect was not argued before it. However, in Sajjan Singh's case, where admittedly this point was not argued also (see the judgements of Gajendragadkar C.J. and Mudholkar J.) the Chief Justice dealt with this point, which made Mr. Seervai to observe in his book:[9]

"It is most unfortunate that Gajendragadkar C.J., Hidayatullah J. and Mudholkar J. should have discussed a question of such grave importance without hearing arguments on it because admittedly the aggrieved party did not urge any argument disputing Parliament's competence to amend fundamental rights. This fact robs the judgments of any value they might have had if delivered after full argument."

Before I deal with that case I wish to make a few preliminary remarks which will prepare ground for what I have to say later. The Indian Constitution made no distinction between Natural Rights, in the sense in which Locke used the expression, and Civil Rights in the Jeffersonian thinking. Article 19

Rights are those which a man, born free, has. In the American Constitution they are summarised as the right to life, liberty and the pursuit of happiness. The Declaration of Independence mentions these. Blackstone distinguished between 'Absolute' and 'Relative' Rights and observed:

> "The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies."

It will be noticed that Jefferson did not mention rights in property in the Declaration of Independence but stated therein that Governments are instituted among men to secure their rights and that Governments derive their just powers from "the consent of the governed." Madison, also spoke of the difference between 'Natural' and 'Social'Rights. Natural rights are those which are endowed"by the Creator" and Social Rights are those which the Society upholds, through law or custom.

Rousseau said that man sacrifices his rights for Society but often insists that some rights must be kept intact 'integrally and wholly'.

the State a guarantee for security in the enjoyment of certain rights. It was Locke who included property rights among Natural Rights and the Virginia Bill of Rights said this explicitly. However, when Lafayette sent the draft of the Declaration of the Rights of Man to Jefferson it contained the words 'le soin de son honneur' and the words 'droit a la propriété'. Jefferson put brackets round the latter expression but Lafayette, who was under the influence of the French Physiocrats retained both the expressions. In our Constitution the Preamble makes no mention of property rights but it includes them as Fundamental Rights with other rights which are clearly Natural Rights. This was an error to begin with, and then to make the right subject to law was to make it very attenuated. The Constituent Assembly apparently thought that property could be enjoyed but could be acquired for public purpose, provided compensation was paid. But the problem was not so simple.

There is no single principle on which compensation can be determined. The approach changes as frequently as there are cases. Each case involves distinguishing features. Professor Henry J. Abraham[10] gives an illustration which explains the difficulties of assessing compensation. His statement is so succinct that I cannot hope to improve or summarise it. He says:

> "Another illustration, although considerably less in the realm of immediate peril, might be Mr. John Miller's lovely old copper ~~beech~~ Beech on the edge of his private property, directly in the path of a future highway to be built by the Commonwealth of Pennsylvania. The

State has every right to chop down the tree under its power of eminent domain, provided only that it does so for a public purpose, which a state public highway certainly is, and that it grants just compensation, which it usually does quite liberally in these circumstances. But Mr. Miller is not interested in financial compensation. He wants to continue to enjoy the beauty and shade of the magnificient tree, and the sentimental attachments that go with it - he proposed to his wife under it; his children and grand-children climbed it with relish for years. Thus, he, too, may appeal to Courts for equity. His chances for success are undoubtedly considerably less than were those of the steel firm mentioned above, but judges are human beings, not automatons."

You can value property of some kinds but not others. The Land Acquisition Acts provided for such cases, and it was for this reason that the Privy Council allowed not only potential value but also something by way of solatium. But these provisions were almost always excluded by statutory amendments of the Land Acquisition Acts by local legislation.

Even otherwise the problem of compulsory acquisition and the consequential compensation is never a standard, uniform or routine problem. Compensation may be the market value or something less or it may be something more than the market value when potential value or solatium is added thereto. The basic consideration is, of course, first the market value which may be inferred from

evidence of other transactions of equally favourably situated properties sold and purchased openly in very recent times. When principles are stated on which compensation is to be calculated the task of the Courts is not only easy but also avoids, what the Privy Council aptly described as 'an intelligent judicial guess.'

The second observation which I wish to make before taking up Sajjan Singh's case is this. As I have said rights in property were not equal to Natural Rights. My view finds support from a statement of E. Adamson Hoebel[19], whom I quoted earlier also. He says of property:

> "This limiting relationship is traditionally referred to by orthodox lawyers and economists as an exclusive right of use (Holland: Jurisprudence 8th Edn. p. 180, a plenary control over an object) but modern economists and most legal thinkers today recognise that plenary control over any object of property is relative, and that the so-called exclusive right of control is at best a quasi-exclusive right, always limited by implicit customary claims and restraints imposed upon the property by others. Even when there appear to be no explicit legal limitations upon the use and disposition of persons object of property, it is true.

Even though the individual may create or acquire the object of property through his own efforts, it is society and not the individual which creates the circumstances, that make property out of it. (emphasis supplied). For although an individual may be the possessor of some valued object, some res nullius that

he has picked up, occupied or created, that object does not become property until the members of the society at large agree, tacitly or explicitly, to bestow the property attribute upon the object by regulating their behaviour with respect to it in a self-limiting manner. They recognise a special status (Linton, Cultural Background of Personality p. 76) in the owner with respect to the object in question.

"Inheritance is not a transference of possession or of title after death, but is a transference of status from a deceased person to his successor. A. R. Radcliffe-Brown [Patrilineal and Matrilineal Succession; IOWA Law Review 20, 297 (1935)] spoke of transfer of property down the paternal or maternal line. Anthropologically the right to enjoy comes from transmission of status.

The comment of Hoebel was that Radcliffe-Brown failed to see that transmission of property is really a transmission of status. Indeed in Feudalism, as we have seen land was not transferred but the status of the heir was recognised and that perhaps is only true of primitive societies.

With this background it will be interesting to see what Gajendragadkar C.J. said in the Sajjan Singh case. To begin with it certainly was very unfair of Mr. Seervai to club the names of my brother Mudholkar and myself as having decided a point not argued. He failed to read the opening sentences of our judgements. The judgement of the Chief Justice was circulated to me and Justice Mudholkar and mine to both of them. But the Chief Justice began first and we said a few things only

tentatively because our request for a bigger Bench was uncermoniously turned down by him. The issue was not joined till the second case was heard.

The Bench in Sajjan Singh's case consisted of Gajendragadkar C.J. Justices Wanchoo, Raghubar Dayal, Mudholkar and myself. The majority judgment was delivered by the Chief Justice. Justice Mudholkar and I wrote separate opinions. Of the counsel for the petitioners and interviewers, Mr. Setalvad had already appeared in Shankari Prasad's case and the inverted role which involved going over the ground covered by that case, did not really suit him. He was halting in his submissions.

The Seventeenth Amendment Act added one proviso to clause (1) of Article 31A which prescribed that on acquisition the market value of buildings and lands be paid to the owner, if they were part of his land within the ceiling limit and the land was under his personal cultivation. So far the Amendment strengthened the rights and did not fall within Article 13(2). The next amendment only enlarged the definition of 'estate'. The last amendment was to add forty four Acts in the Ninth Schedule.

The issue was joined in this case. An elaborate judgement was pronounced by the Chief Justice who attempted to strengthen the reasoning in Shankari Prasad's case. The request for a reconsideration was raised by the petitioners also but was rejected. The Chief Justice observed:

> "It was, however, urged before us during the course of the hearing of these writ petitions that we should reconsider the matter and review our earlier decision Shankari Prasad's case, 1952 SCR 89: (ATR 1951 SC 458)."

x x x x x

In view of the said plea, however, we have deliberately chosen to deal with the merits of the contentions before referring to the decision itself. In our opinion, the plea made by the petitioners for re-considering Shankari Prasad's case is wholly unjustified and must be rejected."

The learned Chief Justice read Article 368 and said that unless the Amendment required the special procedure of the proviso to that Article, the matter had to be considered under the main part. He opined that as there was no mention of Articles 12 to 35 in the Proviso, amendment of the rights in those articles could be done by following only the procedure in the opening part without the additional procedure of the Proviso. This involved the fallacy of petito principii. This is further clear from the following passage in the judgement.

> "When the Constitution makers did not include Part III under the proviso, it would be reasonable to assume that they took the view that the amendment of the provisions contained in Part III was a matter which should be dealt with by Parliament under the substantive provisions of Art. 368 and not under the proviso.
>
> x x x x x x x
>
> .... as a matter of construction, there is no escape from the conclusion that Art. 368 provides for the amendment of the provisions contained in Part III without imposing on Parliament an obligation to adopt the procedure prescribed by the proviso.

The sum total of his reasoning was that whatever did not fall within the proviso must fall within the opening part and as the fundamental rights were not specially protected by the Proviso they could be changed under the procedure of the first part of Art. 368. The learned Chief Justice next repeated the distinction between ordinary legislation and legislation under constituent power and kept all amendments immune from the attack of Article 13(1) and (2). He did not add to the reasons advanced by Patanjali Shastri J. (as he then was), explaining away the observations of Kania C.J. in A.K. Gopalan v. State of Madras A.I.R. 1950 S.C. 27 at 34 to the following effect:

> "the inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid."

In my separate opinion I agreed with the Chief Justice in his rejection of the contention that the Seventeenth Amendment Act required for its valid enactment the special procedure of the proviso. I approved of the reasoning in Shankari Prasad's case. I had difficulty in accepting the reasoning regarding the exclusion of Article 13 from consideration in connection with the Amendments of the Constitution. I rejected the reasoning which was two fold. The first was that as Constitutional law was distinguishable from other municipal laws, and as there was no 'clear indication' to be found that the Fundamental Rights were 'immune from Constitutional amendments' only the invasion

tutional laws must be the subject of prohibition in Article 13(2). The next reason I described as 'perfectly general' and it allowed amendment of "the Constitution without any exception whatsoever" and therefore Article 13(2) did not cover a Constitutional amendment. I also summarized the reasoning which prevailed and which I have stated here in brief. I concluded this opinion by saying:

" x x x x x x x x

But the article nowhere says that the preamble and every single article of the Constitution can be amended by two-thirds majority despite any permanency in the language and despite any historical fact or sentiment.

The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority. To hold this would mean prima facie that the most solemn parts of our Constitution stand on the same footing as any other provision and even on a less firm ground than that on which the articles mentioned in the proviso stand. The anomaly that Art. 226 should be somewhat protected but not Art. 32 must give us pause. Article 32 does not erect a shield against private conduct but against state conduct including the legislatures (See Art. 12). Can the legislature take away this shield? Perhaps by adopting a literal construction of Art. 368 one can say that. But I am not inclined to play a grammarian's role. As at present advised I can only say that the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions."

For these reasons I did not express a final opinion.

Mudholkar J. agreed with me in expressing doubts about the ruling in Shankari Prasad's case. His reasons are forceful and for the most part follow the reasoning in my opinion. In fact he observed:

> "Since my Lord the Chief Justice in his judgment has dealt with the first contention also and expressed the view that the previous decision is right I think it necessary to say, partly for the reasons stated by my learned brother Hidayatullah and partly for some other reasons, that I would reserve my opinion on this question and that I do not regard what this Court has held in that case as the last word."

In his forceful opinion he rejected some of the reasoning and reserved his opinion on the larger issues as I had done. It is sad that he had retired before the next case came. It is significant that the learned Chief Justice himself noticed the anomaly between the treatment of Article 32 and the treatment of Article 226. He observed this:

> "Parliament may consider whether the anomaly which is apparent in the different modes prescribed by Article 368 for amending Articles 226 and 32 respectively, should not be remedied by including Part III itself in the proviso."

He was not, however, prepared to say that Article 13(2) cut across Article 368 despite its location in another part of the Constitution.

There ended the first case. The second case I shall deal with in the next lecture.

1. A.I.R. 1952 S.C. 252

2. Constitutional Law of India

3. A.I.R. 1951 Cal 111 and A.I.R. 1952 Cal 554

4. A.I.R. 1954 S.C. 170

5. See my lecture VII

6. (1939) F.C.R. p. 18, 46, 107

7. See note 3 above

8. A.I.R. 1971 S.C. 530

9. Constitutional Law of India Vol. I p. 645

10. Commentaries Book I, ch. 1, 124

11. Henry J. Abraham: The Judicial Process III Ed. p. 16

12. E. Adamson Hoebel: The Law of the Primitive Man p. 56

L E C T U R E IX

THE FINAL STAGE.

L E C T U R E IX

THE FINAL STAGE.

You must have noticed that in my last lecture I spoke more of the amendments of the Constitution and less of the right to property. This was necessary to understand the attitude of the Governments of the day regarding right to property particularly, in land, in the means of production and in the banks. The most important amendments over the years were of Article 31, and were made to abridge or abolish certain existing rights to property. Previous to these amendments many Acts were passed by the State Legislatures and some were declared unconstitutional. Some others were declared void because compensation for the deprivation of property rights was considered inadequate. The amendments put such Acts beyond the reach of the Courts and in respect of those that were declared unconstitutional, the judgments of the Courts were judicially vacated. Therefore, the amendments seeking to protect the Acts became the subject of attack in the Supreme Court.

In my last lecture I had spoken of the provisions of the Constitution which were expected to keep such matters away from the scrutiny of the Courts. By the time of the Seventeenth Amendment Act twenty Acts of the State Legislatures were given protection and were made immune from Articles 14, 19 and 31. A new amendment Act was brought into force. The Seventeenth Amendment Act added another forty four State Acts to the Ninth Schedule and any Act named in that Schedule was not to be questioned by Courts. An examination of these sixty four Acts shows that a large number of them were designed to bring about land reforms and some abolished the old tenures which I had described earlier. Thus were abolished all Jagirs and tenures

such as Maliki, Taluqdari, Zamindari, Khoti, Biswedari and others. In most cases, after the proprietors under these tenures lost their rights, Raiyatwari tenure was imposed. There were also many State Acts under which lands were acquired for the settlement and rehabilitation of refugees and displaced persons. Lands which had concessional assessments, such as Inam, Ijara and Kowli lost their concessions and and the Jenmakaram payments were abolished. I had explained all these tenures and some others in an earlier lecture so that the target of the amendments may be seen clearly. In addition to these long-standing vested rights, which were withdrawn, attempt was made to protect some special amendments of the Railways and Insurance Acts and Acts by which lands belonging to religious and charitable institutions in Assam were acquired. Some State Acts put a ceiling on agricultural holdings and excess lands were either acquired or redistributed. Most of the Acts were not even considered by Courts because they never went there for examination, even with reference to the distribution of legislative powers. Often the names of the Acts were added to the Ninth Schedule in answer to requests from the State Governments, without scrutiny from these angles, and others. Leaving aside questions about breach of Fundamental Rights, there was no examination of the other question whether the Legislatures had acted within jurisdiction.

It was in the context of these changes and the drastic nature of the provisions of the Seventeenth Amendment Act, particularly the ouster of the jurisdiction of Courts, that Subbarao C.J. referred certain petitions challenging this Amending Act for consideration by the whole Court. The case in which

the decision was given is the well-known Golaknath v. State of Punjab.[1] A request for reference to a larger Bench was refused by Gajendragadkar C.J. inspite of the doubts expressed by Mudholkar J. and myself about Shankari Prasad case.[2]

The case was heard for many days and five judgments were pronounced. Subbarao C.J.'s judgment was on behalf of Shah, Sikri, Shelat and Vaidialingam JJ. Justice Wanchoo spoke on behalf of himself and Bhargava and Mitter JJ. Bachawat J. Ramaswami J. and myself delivered separate opinions. Bachawat J. and Ramaswami J. agreed with Wanchoo J. After our discussions, Sikri J. had tentatively agreed with my views. In fact he wrote out the synopsis in his own hand, but later agreed with the Chief Justice. In the petition Golaknath had challenged also the First and Fourth Amendment Acts. At one stage the Chief Justice was prepared to declare them unconstitutional (of course prospectively) if I agreed to sign his judgment. I did not subscribe to the doctrine of prospective over-ruling which had never been used, even in the country of its birth, in respect of Constitutional Amendments. It has quite a different use and is mainly used in criminal cases.

Although the judgments were dealing with the question of right to property, none of the other judgments attempted to explain the nature of the right. I alone did that. The subject of right to property in the past also had received scant attention. The first time it was considered in the Supreme Court was in Charanjit Lal Chowdhury v. Union of India.[3] The question then was of the nature of the rights of share-holders in a Company and whether that right was 'property'. It was held that such a right was not property, and only that could be regarded as property

which could be acquired, disposed of or taken possession of. This referred to Article 19(1)(f). This did not help to solve the question of protection of right to property.

Then followed three cases in 1954. The first two were decided within a day of each other, and perhaps together, because some judges gave an opinion covering both cases. In State of West Bengal v. Subodh Gopal,[4] the Supreme Court considered what Patanjali Sastri C.J., described in his judgment, as "the extent of protection which the Constitution of India accords to ownership of private property." In that case the plaintiff purchased at a court sale a complete Touzi and, under section 37 of a Bengal Act, he had the right "to avoid or annul all under-tenures and forthwith eject all undertenants." He gave notices of ejectment and brought a suit for their eviction. Recognising that section 37 was harsh, an amending Act was passed to give security to this and other classes of tenants and under the provisions of the amending Act all suits then pending by virtue of Section 27, were ordered to abate. This provision was held unconstitutional by the Calcutta High Court. The reason given by the learned Judges was that the amendment had taken away this right without even a remission in the price which the purchaser had paid. The appeal in the Supreme Court succeeded and the decision of the Calcutta High Court (Sir Trevor Harries and Banerjee J.) was reversed.

We are not concerned with the actual case but with certain observations of the judges on the scope of the right to property. Patanjali Sastri C.J.[5] observed(p.95):

> "Sub-clause (f) of clause (1) of Art. 19 has, in my opinion, no application to the case. That article enumerates certain freedoms

under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. The freedom declared in subcls. (a) to (e) and (g) are clearly of that description and in such context sub-cl.(f) should, I think, also be understood as declaring the freedom appertaining to the citizen of free India in the matter of acquisition, possession and disposal of private property. In other words, it declares the citizen's right to own property and has no reference to the right to the property owned by him, which is dealt with in Art. 31."
(emphasis added.)

The learned Chief Justice rightly recognised the Natural Rights but by his reasoning he elevated sub-clause (f) also to the position of a Natural Right. He stated this more clearly in another passage which reads (p.95):

"I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen "to acquire, hold and dispose of property" with other natural rights and freedoms inherent in the status of a free citizen and embodied them in Art. 19(1), while they provided for the protection of concrete rights of property owned by a person, in Art. 31" (emphasis added)

He again said (p.95):

"I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under cl.(1) of Art.19, the powers of State regulation of those free-

doms in public interest being defined in relation to each of those freedoms by cls. (2) to (6) of that article, while rights of private property are separately dealt with and their protection provided for in Art. 31, the cases where social control and regulation could extend to the deprivation of such rights being indicated in para.(ii) of sub-cl.(b) of cl,(5) of Art. 31 and exempted from liability to pay compensation under cl.(2)." (emphasis added).

I am afraid this attitude towards Article 19(1)(f) which was merely a declaration of a right in abstract and in rem should have been considered with the power which the State (including the legislatures) was given by the other provisions particularly the Legislative Lists and clause (5) of Article 19 and Articles 31, 31-A and 31-B. The learned Chief Justice only compared Art. 19(1)(f) with Article 31.

The second case is Dwarakadas Srinivas v. Sholapur Spinning and Weaving Co.[6], Mahajan J. (later C.J.) came much nearer the mark. After noticing that each of the freedoms received treatment in a sub-chapter the learned judge observed (p.126):

> "Under this scheme the fundamental right regarding property apart from personal and property freedoms has been dealt with in this part separately as a self-contained provision and as a distinct subject from the various freedoms declared by Art. 19. In considering Art. 31 it is significant to note that it deals with private property of

persons residing in the Union of India, while Art. 19 only deals with citizens defined in Art.5 of the Constitution. It is thus obvious that the scope of these two articles cannot be the same as they cover different fields. It cannot be seriously argued that so far as citizens are concerned, freedoms regarding enjoyment of property have been granted in two articles of the Constitution, while the protection to property qua all other persons has been dealt with in Art. 31 alone. If both articles covered the same ground, it was unnecessary to have two articles on the same subject. The true approach to this question is that these two articles really deal with two different subjects and one has no direct relation with the other, namely, Art.31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this article. In other words, the State's power to take the property of a person is comprehensively delimited by this article."

I think the true approach was to regard Article 19(1)(f) as a declaration of a freedom for the citizen and to regard the sub-chapter headed "Right to Property" as the mode of exercise of the right by all persons, whether citizen or not, and the power of the States to cut across the exercise of the right. Then only the fundamentality of the right would have given way to State control.

According to Mahajan J. the meaning of Article 31(1) was brought out best by the observations of Coolley[7] and he quoted this passage:

"Legislative Authority Requisite: The right to appropriate private property to public

> uses lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions and agencies for its appropriations. Private property can only be taken pursuant to law."

This is exactly what should have been held in the cases that followed but the judgments went off at half-cock.

In the third case, The Commissioners etc. v. Sri Lakshmundia Tirtha Swamiar,[8] the observations of Patanjali Sastri C.J. were criticised on the same lines and were disapproved.

It is plain that in the four cases on the subject of right to property, the true nature of that right under Art. 19(1)(f) was not considered. In my previous lecture I showed the difference between Natural Rights and Civil Rights. When the topic of property came up for consideration in Golaknath case I had that distinction in mind. In so far as my colleagues in the case were concerned they considered only the general propositions regarding the amendability of the Constitution, the special procedures prescribed and the power and jurisdiction of Parliament in that behalf. They made no distinction between one kind of Fundamental Right and another. This was the same fallacy, if I may say with due respect, in the two earlier cases of Shankari Prasad and Sajjan Singh[9] also. Some rights had the assistance of the Preamble but property had not. The learned judges who were in a minority were so much taken up with the power of Parliament that having once discarded the implications of Article 13, they had no difficulty in making the power under article 368 (first part) equal to the British Parliament's omnicompetence. They were in full agreement with the two earlier cases and had really very little to add. In so far as Subbarao C.J. and

the other four judges were concerned they saw no harm if they prospectively overruled the earlier decisions. They made little attempt to focus attention on the real difference between Article 19(1)(a) to (e) and (g) and Article 19(1)(f) with Article 31 as amended from time to time. It fell to me, as the odd eleventh judge, to deal with the right to property and its protection. I may say with some satisfaction that what I said there and subsequently in some speeches, resulted in the final shape which the Constitution has today and all the earlier cases have become obsolete except my judgment in Golaknath case on these rights.

I began by saying that Article 19(1)(f) made right to property a fundamental right and then asked the question: "Why was it necessary to make such a Fundamental Right at all?" I then answered this question myself and dealt with the problem where Mahajan J. had left off. I shall quote a few passages from my judgment because it will save me from restating my opinion here. This is what I said first (p.1708):

> "There is no natural right in property and as Burke said in his Reflections, Government is not made in virtue of Natural Rights, which may and do exist in total independence of it. Natural rights embrace activity outside the status of citizen. Legal rights are required for free existence as a social being and the State undertakes to protect them. Fundamental Rights are those rights which the State enforces against itself. Looking at the matter briefly but historically, it may be said that the Greeks were not aware of these distinctions for as Gierke points out they did not distinguish between personality as a citizen and personality as a human being. For them the

Individual was merged in the citizen and the citizen in the State. There was personal liberty and private law but there was no sharp division between the different kinds of laws. The Romans evolved this gradually, not when the Roman Republic existed, but when the notion of a Fiscus developed in the Empire and the legal personality of the Individual was separated from his membership of the State. It was then that the State began to recognize the rights of the Individual in his dealings with the States. It was Cicero who was the first to declare that the primary duty of the Governor of a State was to secure to each individual in the possession of his property. Here we may see a recognition of the ownership of property as a Fundamental Right. This idea was so engrained in early social philosophy that we find Locke opining that "Government has no other end but the preservation of property". The concepts of liberty, equality and religious freedom were well-known. To them was added the concept of property rights. Later the list included "equalitas, Libertas, ius securitatis, ius defensionis and ius puniendi." The concept of property right gained further support from Bentham and Spencer and Kant and Hegel. The term property in its pristine meaning embraced only land but it soon came to mean much more." (emphasis added)

I then considered many theories about right to property and said this (p.1710):

"Our Constitution accepted the theory that Right to Property is a fundamental right. In my opinion it was an error to place it in that

category. Like the original Art. 16 of the Draft Bill of the Constitution which assured freedom of trade, commerce and intercourse, within the territory of India as a fundamental right but was later removed, the right of property should have been placed in a different chapter. Of all the fundamental rights it is the weakest. Even in the most democratic of Constitutions, (namely, the West German Constitution of 1949) there was a provision that lands, minerals and means of production might be socialised or subjected to control. Art. 31, if it contemplated socialization in the same way in India, should not have insisted so plainly upon payment of compensation."

And finally I said:

"What was then the theory about Right to Property accepted by the Constituent Assembly. Again I can only describe it historically. Grotius had treated the right as an acquired right (ius quaesitum) and ownership (dominium) as either serving individual interests (vulgare) or for the public good (eminens). According to him, the acquired right had to give way to eminent domain (ex vi super-eminentis dominii) but there must be public interest (publica utilitas) and if possible compensation. In the social contract theory also the contract included protection of property with recognition of the power of the ruler to act in the public interest and emergency. Our Constitutional theory treated property rights as inviolable except through law for public good and on payment of compensation. Our Constitution saw the matter in the way of Grotius but overlooked the possibility that just compensation may not be possible. It follows almost literally the German jurist Ulrich Zasium (except in one

respect): Princeps non potest auferre mihi rem mean sive iure gentium, sive civile sit facta mea."

As regards the amendments which succeeded one another in rapid succession as each case went against the State I said (p.1712):

"The opening words of the former second clause were modified to make them more effective but the muzzling of courts in the matter of adequacy of the compensation was the important move. This was achieved by the Fourth Amendment Act. As Basu says: "It is evident that the 1955 amendment of clause (2) eats into the vitals of the constitutional mandate to pay compensation and demonstrates a drift from the moorings of the American concept of private property and judicial review to which our Constitution was hitherto tied, to that of socialism." It is appropriate to recall here that as expounded by Professor Beard (whose views offended Holmes and the Times of New York but which are now being recognised after his further explanation) the Constitution of the United States is an economic document prepared by men who were wealthy or allied with property rights, that it is based on the concept that the fundamental rights of property are anterior to Government and morally beyond the reach of popular majorities and that the Supreme Court of the United States preserved the property rights till the New Deal Era. The threat at that time was to enlarge the Supreme Court but not to amend the Constitution. It appears that the Indian Socialists charged with the ideas of Marx, the Webbs, Green, Laski and others viewed property rights in a different

way. Pandit Nehru once said that he had no property sense, meaning that he did not value property at all. The Constitution seems to have changed its property sense significantly."

With the assistance of my views India was moving slowly to treating right to property as an acquired right in the sense in which Bestial-Schulze wrote of the Systems of Acquired Rights.[10]

In the matter of compensation Pandit Nehru had said that compensation could be determined by the Legislature and not the judiciary. His words were (p.1713):

"The law should do it. Parliament should do it. There is no reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in."

It is to be noticed that his remarks at the time of the First Amendment were:

"...The major amendments are in regard to article 19 and article 31 ... When we felt that some parts of the Constitution, as the judiciary interpreted them, were coming in the way of social or other progress, it was the right thing and inevitable thing for us to come to this House and ask this House to approve of certain changes. The changes are not great or vital.

A great deal has been said about those changes and yet I do say, as I said at an earlier stage, that every change that is referred to here is implied in the Constitution itself. Take article 31-A or 31B dealing with land reform or the abolition of the zamindari. The Constituent Assembly took great and considerable care to lay down that these changes should not be challenged in

a court of law. Inspite of this care, perhaps the language was not clear enough. That was our fault and so it has been challenged and these reforms have been in conseauence delayed. Now, are we to wait for this delaying process to go on and for this process of challenge in courts of law to go on month after month and year after year?"

Pandit Nehru prophesied that the basic problem would come before the House from time to time. That it has, there is no doubt, just as there is no doubt that each time the Individual's rights have suffered.

Writers on the subject have only considered the judgment of Subbarao C.J. and compared it with the judgment of Justice Wanchoo. They do not even notice that the words 'prospective overruling' were not even used by me and the other five judges did not consider whether the doctrine of prospective overruling could be used because they did not overrule anything.

In the Golaknath case I did not give any support to Subbarao C.J's theory. I adopted the doctrine of acquiescence. My reasons were that the First Amendment Act was approved by the Supreme Court in 1951 and the Fourth Amendment Act of 1955 was not even questioned before the Courts. Meanwhile many State Acts were protected and placed beyond the reach of Courts.

The doctrine of prospective overruling came to this that the case Shankari Prasad and Sajjan Singh became bad law after the decision of Subbarao C.J. Actually the other five judges did not overrule them and I overruled only Sajjan Singh case and not Shankari Prasad. I applied the doctrine of acquiescence. As Professor John P. Frank, Associate Professor of Law at Yale University, said:[12]

> "It would be calamitous to have the validity of Constitutional amendments brought into serious

question long after their promulgation, even if, for example, some one could now bring in absolutely conclusive proof that the 13th Amendment had never been validly adopted, he would happily not be heard to raise the issue," and the learned Professor cited in support Coleman v. Miller.[13] The First and the Fourth Amendments having become part of our Constitution, the First with the approval of the Supreme Court and both by the acquiescence of the people, it is too late now to hear any argument about their validity. They stay and what is more give authority to make further amendments of the same character having got rid of the weapons of Arts. 14, 19 and 31. I, however, did not approve of the device of adding statute after statute to the Ninth Schedule and said that ours was the only Constitution which carried a list of Statutes to which it gave protection against itself. This is what I said (p.1716):

"This brings me to the third section of the Act. That does no more than add 44 State Acts to the Ninth Schedule. The object of Art.31-B, when it was enacted, was to save certain State Acts notwithstanding judicial decision to the contrary. These Acts were already protected by Article 31. One can with difficulty understand such a provision. Now the Schedule is being used to give advance protection to legislation which is known to or expected to, derogate from the Fundamental Rights. The power under Art. 368, whatever it may be, was given to amend the Constitution. Giving protection to statutes of State Legislature which offend the Constitution in its most fundamental part, can hardly merit the description "amendment of the Constitution." In fact in some cases it is not even known whether the Statutes in question stand in need of such aid. The intent is to

silence the Courts and not to amend the Constitution. If these Acts were not included in the Schedule they would have to face the Fundamental Rights and rely on Arts. 31 and 31-A to save them. By this device protection far in excess of these articles is afforded to them. This in my judgment is not a matter of amendment at all. The power which is given is for the specific purpose of amending the Constitution and not to confer validity on State Acts against the rest of the Constitution. If the President's assent did not do this, no more would this section. I consider S.8 of the Act to be invalid as a legitimate exercise of the powers of amendment, however, generous. Ours is the only Constitution in the world which carries a long list of ordinary laws which it protects against itself. In the result I declare s.8 to be ultra vires the amending process."

In the Golaknath case I restricted what had been approved by the court regarding the power of amendment to what had already been done. I did not agree to extend the same process to other fundamental rights which were Natural Rights. In fact I said this (p.1715):

"I am apprehensive that the erosion of the right to property may be practised against other Fundamental Rights. If a halt is to be called, we must declare the right of Parliament to abridge or take away Fundamental Rights. Small inroads lead to larger inroads and become as habitual as before our freedom was won. The history of freedom is not how freedom is

achieved but how it is preserved. I am of opinion that an attempt to abridge or take away Fundamental Rights even through an amendment of the Constitution can be declared void. This Court has the power and jurisdiction to make the declaration."

The observation was called a political approach by Mr. Setalvad and recently by Professor Buxi. I am reminded of what Lord Bryce said of the United States of America. He said that in the States every political question ends by being a judicial question. In our country every judicial question ends by being called a political question. This is because, unlike our judges, American judges are trusted as against the sentiments of politicians. The expression "political question" applies to what cannot be a justiciable question. The whole of Part IV dealing with the Directive Principles are political questions. The whole of Part III dealing with Fundamental Rights, each one of which is enforceable by Court is a source of judicial questions. In one of my lectures I said:

> "To call a question a political question and to relieve oneself of the task of deciding it and leave it to other departments may be good device, but as Professor Post says, "it sometimes leaves national issues hanging in mid-air so that none decides it."[14]

Because of the Golaknath case, Parliament passed the Twenty Fourth Amendment Act in 1971 with the object of providing expressly for Parliament's power to amend any part of the Constitution. By that Amendment Article 13 was completely avoided automatically by any amendment made under Article 368. Indeed if instead of having to include Legislative Acts it had been said no legislation will be called in question on the gound that it offends the whole chapter on Fundamental Rights. I am sure some

of the reasoning in Shankari Prasad and Sajjan Singh cases would have given it validity. I shall come to it after I have dealt with the next amending Act and the approval of it by the Supreme Court overruling Golaknath case, clearly an unnecessary exercise.

The question of adequacy of compensation for property requisitioned or acquired raised in Bela Banerjee [15] case was settled by the First Amendment Act. This was done by introducing Art.31-A. It only took care of the extinguishment of the rights mentioned on one condition only that the Bill should receive the President's assent to become law. Simultaneously Article 31-B was added to validate Acts and Regulations in which the courts had either interfered or were invited to do so by putting the Acts out of their reach. The names of the Acts and Regulations were shown in Schedule IX newly introduced. By the Fourth Amendment Act the reach of Art. 31 was made greater by providing that thereafter no law could be called in question in any court on the ground that the compensation was not adequate. Similarly Art. 31-A was extended to cover not only 'estates' but also corporations and other rights accruing from agreements, leases and licences for the prospecting or mining of minerals or mineral oil and the definition of 'estate' was extended to cover all proprietors, tenure-holders, including all raiyats of any degree.

Golaknath case was not concerned with the question of adequacy of compensation. It was only concerned with the extent of power of amendment. It was held in that case

that the powers of amendment were subject to the provisions of Article 13. Insofar as rights to property were concerned they continued to be governed by the amended Article 31 and Articles 31-A and 31-B. The position reached in Golaknath case was neutralised by the Twenty-fourth Amendment Act. This amendment snapped the connection between Article 13 and Article 368 established by that decision. This was achieved by amending Article 13 by saying:

> "2. Amendment of article 13.- In article 13 of the Constitution, after clause (3), the following clause shall be inserted, namely:
>
> '(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.' "

and Article 368, by way of double check, by saying:

> "(3) Nothing in article 13 shall apply to any amendment made under this article."

The power of amendment was said to be all-inclusive and it was affirmed that it included any addition, variation or repeal in the existing provisions. Power had already been taken to make amendments retrospectively and as if to remove the last stumbling block, the President could not refuse his assent. I do not know which would have been more derogatory to the President, to have said that there was no need for his assent or to say that he shall give his assent! Thenceforward there was no brake of any kind on the powers of amendment.

Meanwhile the question of adequacy of compensation again arose in four cases. It is not necessary to refer to the Metal Corporation[16] case which was a two-judge decision with Subbarao J. and Shelat J. That case had a chequered career. Overruled expressly in Gujarat v. Shantilal Mangaldas[17] it was reconsidered and revived in the Bank Nationalisation[18] case. Curiously enough it was each time the decision of Shah J. and he seems to have been persuaded to that view by Shelat J. No other judge seems to have been interested. There were two other cases of the Supreme Court besides these two. They were decided on the same day and were heard together. The name of one is P. Vajravelu Mudaliar v. Special Deputy Collector, Madras[19] and the other N.B. Jeejeebhoy v. Assistant Collector, Thana.[20]

As a prelude to what I say let me quote Mr. Seervai. This is what he says:

> "The provisions of the 4th Amendment as to the adequacy of compensation were considered by the Supreme Court in four decisions. In Vajravelu's case, Subba Rao J. refused to accept the logic of his own argument as that would have nullified the 4th Amdndment, but he swung over to the other side and in the Metal Corporation case nullified the 4th Amendment; in Shantilal Mangaldas' case Shah J. overruled the Metal Corporation Case because it nullified the 4th Amendment, but in the Bank Nationalisation Case he swung over to the other side and, in effect, nullified the 4th Amendment."

Mangaldas:

"I have read the weighty judgment proposed to be delivered by my brother Shah and I find myself so much in agreement with it that I consider it unnecessary for me to express myself. However, it is proper for me to say a few words in explanation since I was a party to P. Vajravelu Mudaliar case (1965) 1 SCR 614 = (AIR 1965 SC 1017) and the obiter pronouncement of some opinions there. That case was heard with N.B. Jeejeebhoy case (1965) 1 SCR 636= (AIR 1965 SC 1096). One was a post-Constitution (Fourth Amendment) case and the other a pre-Constitution case. The judgments in the two cases were delivered on the same day. It appears that the reasoning in the two cases was not kept separate and the whole of the matter was discussed in a case in which it was not necessary for the ultimate conclusion. Because of the close proximity of the decisions, it escaped me that the discussion was in the wrong case and the other merely followed it. My brother Shah has now made the two cases to fall in their proper places. It is certainly out of the question that the adequacy of compensation (apart from compensation which is illusory or proceeds upon principles irrelevant to its determination) should be questioned after the Amendment of the Constitution. The Amendment was expressly made to get over the effect of the earlier cases which had defined compensation as just equivalent.

Such a question could not arise after the amendment. I am in agreement that the remarks in P. Vajravelu's case (1965) 1 SCR 614 = (AIR 1965 SC 1017) must be treated as obiter and not binding on us. I am also of the opinion that the Metal Corporation case, (1967) 1 SCR 255=(AIR 1967 SC 637) was wrongly decided and should be overruled."

Indeed Shah J. also reached the same conclusion regarding the Metal Corporation case in Gujarat v. Shantilal Mangaldas case. This is what he had said:

"We are unable to agree with that part of the judgment. The Parliament had specified the principles for determining compensation of the undertaking of the company. The principles expressly related to the determination of compensation payable in respect of unused machinery in good condition and used machinery. The principles were set out avowedly for determination of compensation. The principles were not irrelevant to the determination of compensation and the compensation was not illusory. In our judgment, the Metal Corporation of India Ltd.'s case (1967) 1 SCR 255 = (AIR 1967 SC 637) was wrongly decided and must be overruled."

As to Vajravelu case Shah J. held that the remarks were obiter. His exact words were:

"In P. Vajravelu Mudaliar's case, (1965) I SCR 614 = (AIR 1965 SC 1017) the Court held that the principles laid down by the impugned statute were not open to question. That was sufficient for the purpose of the decision of the case, and the other observations were not necessary for deciding that case, and cannot be regarded as a binding decision."

However, in the Bank Nationalisation case, Shah J. said the contrary:

> ".... the relevant aspect of the legal position evolved by the said decisions may be stated thus: Under Article 31(2) of the Constitution, no property shall be compulsorily acquired except under a law which provides for compensation for the property acquired and either fixes the amount of compensation or specifies the principles on which, and the manner in which, compensation is to be determined and given. The second limb of the provision says that no such law shall be called in question in any court on the ground that the compensation provided by the law is not adequate. If the two concepts, namely, "compensation" and the jurisdiction of the court are kept apart, the meaning of the provisions is clar. The law to justify itself has to provide for the payment of a "just equivalent" to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product can not be questioned in a court of law. The validity of the principles, judged by the above tests, falls within judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction."

The Bank Nationalisation case led to the Twenty Fifth Amend ment Act. Clause 31(2) was again reenacted and the word 'compensation' was replaced by the word 'amount' which,determined under the principles stated, could not be questioned. A new clause 2B was also added and it said:

> "Nothing in sub-clause (6) of clause (1) of article 19 shall affect any such law as is referred to in clause (2)."

The amending Act also added a new article numbered 31(c). It read:

> "Saving of laws giving effect to certain directive principles: Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31, and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:
> Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

The earlier constitutional amendments had given no protection to 'principles' stated in the act affecting property. This new amending Act gave a half-hearted protection. After the Bank Nationalisation case went against Government, first an ordinance and later an act were passed. These named lump sum amounts as compensation. I had anticipated all this and my action as Acting President, when I assented to the

my memoirs. This is what I said:

> "I felt that, if challenged, the Act would, perhaps, fail, as the compensation was not a lump sum based on the market price of shares but itemised. It was likely that some items would be found for which no provision was made. Indeed, I said as much to the Prime Minister later when I met her but she had to rely on the Law Ministry." 21

I noticed that the kind of ordinance I had suggested to her was kept ready and was promulgated followed by an act and neither were ever questioned.

The Twenty Fifth Amendment Act was questioned and led to the constitution of a bigger Bench than Golaknath case had. But before I go on to discuss the judgment that Bench rendered I wish to refer to another case which was the last in which I took part before I retired from the Supreme Court. That case is the well-known Privy Purse case.[22]

The case did not directly involve property. It questioned only the Presidential Order by which the recognition of all the Rulers was withdrawn. The power to do so was denied by the Supreme Court to the President. Previous to the Presidential Order an attempt was made to amend the Constitution which failed in the Rajya Sabha where the minimum two thirds majority was short by a fraction of a vote. The President, purporting to act under the authority of Article 366(22) (which was only a definition section), made orders in respect of each and every Ruler that he ceased to be a Ruler. These orders were declared ultra vires because Article 291 ordered payment of Privy Purses, the Appropriation Act provided the money and on the date of the decision an instalment had already fallen due and the money was being withheld.

It was necessary to see whether Article 363(1) barred the petition under Article 32 and if it did not, whether any fundamental right was breached. The question whether the liability to pay the Privy Purses could be regarded as 'property' for the application of Articles 19 and 31 and ultimately article 32 had to be gone into. I reasoned (and this reasoning was later approved again by the Supreme Court) as follows:

> "This old concept of property is no longer held to be true. Markby (0) regards the liability of the promisor as itself a thing which is capable of being brought and sold assigned and transferred and if of money value may itself be regarded as an object of ownership. An obligation according to him is as much a res as any other property and the only difference is in the mode of enjoyment. The creditor realizes this ownership by compelling the debtor to perform his obligation. As illustration he gives a catalogue of passive rights of ownership. Anson (Principles of Law of Contract) supports him by pointing out that an obligation is a right of control exercisable by one person over others for acts which have a money value.
>
> x x x x x x x x x
>
> The dynamic theory of obligations regards a debt as a claim to an equivalent in value to a floating charge against the generality of things which are the properties of the debtor. From this is developed the notion of a credit debt where property rights arise from a promise, express or implied in respect of ascertained or readily ascertained sums of money. Thus a debt

or a liability to pay money passes through four stages. First there is a debt not yet due. The debt has not yet become a part of the obligor's 'things' because no net liability has yet arisen. The second stage is when the liability may have arisen but is not either ascertained or admitted. Here again the amount due has not become a part of the obligor's things. The third stage is reached when the liability is both ascertained and admitted. Then it is property proper of the debtor in the creditor's hands. The law begins to recognise such property in insolvency, in dealing with it in fraud of creditors, fraudulent preference of one creditor against another, subrogation, equitable estoppel, stoppage intransitu etc. A credit-debt is then a debt fully provable and which is fixed and absolutely owing. The last stage is when the debt becomes a judgement-debt by reason of a decree of a court. Thus an American Judge held 'oustanding uncollected accounts' as property: Standard Marine Insurance co. v. Board of Assessors, 123 L.Ed. 717 at p.720. It is because of this that the French Law includes such obligations in mobiles." 23

This case led to the Twenty Sixth Amendment Act to which I need not refer. The case need not trouble us here because by the Twenty Sixth Amendment Act, Article 363 A was introduced under which recognition granted to the Rulers of Indian States ceased and the Privy Purses were abolished and article 291 and 362 were omitted. In the Privy Purses case, Government was expecting the Court to do this by ignoring the articles later repealed.

I am not going to discuss at length Kesavananda v. State of Kerala[24], which overruled the Golaknath case. The reasoning was the same which we have noticed from Shankari Prasad's case. That reasoning is only this much that article 13 did not govern article 368 because the former referred to a law which was different from the law which article 368 engendered. It was not noticed that the definition of law in article 13 was not exhaustive and that the article placed an embargo on the "State" in all its instrumentalities.

It was hardly necessary to overrule the earlier case. It had already become obsolete by reason of the Twenty Fourth Amendment Act. The learned judges had to read the Constitution as they found it and all they had to do was to grant to Parliament the power to enact the amendment. They indeed gave even more power but added nothing to the dissenting views of the minority judges in the Golaknath case.

Their view also was that the word 'law' in article 13 did not comprehend the law emanating from the exercise of the constituent power under article 368. I shall therefore compare their reasoning with what was said about the word 'law' which is also used in similar circumstances by the American Constitution. I did not refer to this aspect in my judgment because one does not write every thing there.

Let me first read to you the relevant provisions. They are almost the same as the original article 13. Article I, Section 1 of the American Constitution reads:

> "All legislative powers herein granted shall be vested in a Congress of the United States,..."

Next we may read Article V in which the power of amendment is given by the Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose

Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. Provided that no Amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Although the word 'law' is not used there we must see the First Amendment. It reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; and abridging the freedom of Speech, or of press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievance."

The word 'law' was not interpreted in this context because in respect of property the attitude of the Supreme Court is to award just compensation; and the question of 'public' purpose for exercise of the eminent domain power is viewed differently by different judges. However the word 'law' is used in section 10 of article I which reads:

> "Section 10: No State shall .....pass any .... law impairing the obligation of contracts..."

In both places the word 'law' has not been defined and it would be remarkable if 'law' meant one thing in one article and another in another article. It stands to reason that what has been said regarding 'law' as used in article I Section 10 would have received approval if occasion had arisen to define the term as used in the First Amendment (I) which I quoted just now.

'Law' was, however, defined in judicial cases and the comment in the official publication is this:

> "Law" defined - The term comprises statutes, constitutional provisions, municipal ordinances and administrative regulations having the force and operation of statutes."

Pausing here, let me read to you once again the definition of the word 'law' in article 13 of our Constitution:

> "Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India, the force of law."

Both definitions are not exhaustive definitions but only include things not strictly 'law' passed by legislatures as statutes. Our definition does not mention 'statutes' or 'constitutional provisions' as does the American comment but if statutes are to be included as law, there is no reason why constitutional provisions should remain excluded. This has nowhere been said and one would expect this to be said here if it was really intended.

In the United States the matter was not viewed as was done in India. There are four cases mentioned in the official book I have been referring to. They are of the Supreme Court of the United States and there is no dissent in any of these cases. All are unanimous. They are: Dodge v. Woolsey 18 How. 331 (1856); Railroad Company v. Mc Clure

10 Wall 511 (1871); New Orleans Gas Co. v. Louisiana Light Co. 115 U.S. 650 (1885); Bier v. McGehee 148 U.S. 137, 140 (1893).

It is not necessary to refer to these cases. The Head note in the second case reads:

> "The Constitution of a State is a law within the meaning of the prohibition of the Constitution of the United States, that no State shall pass a law impairing the obligations of contracts."

The Court said in the body of the judgment:

> "The Constitution of a State is, undoubtedly, a law within the meaning of this prohibition. A State can no more do what is thus forbidden by one than by the other, (emphasis supplied).

The majority decision in Golaknath case said exactly what the emphasised portion says. In the last of the cases mentioned above the Supreme Court observed:

> "That the Constitution of a State is a law of the State within the meaning of the Constitution of the United States ..... is not denied....."

In the third case noted above the matter was still more emphasised. Mr. Justice Harlan, who delivered the opinion of the Court, prepared the Head-note himself and said there:

> "The State can no more impair the obligation of a contract by her organic law than by legislative enactment ....."

There was thus no difference between one law and another.

Now it seems to me that our Constitution and all its parts are established by law (the words of the oath of judges speak of 'as by law established') and we cannot but regard it as a 'law'. If so it

came within the ambit of article 13 which only included some subordinate legislation within the expression. It was however excluded on the specious ground that article 13 contemplated only ordinary legislative process and not an exercise of 'the Constituent power'. I have already explained that the constituent power exercised by the day to day Parliament is what has been conceded to it subject to any restriction in any other part of the Constitution. There was no mention of a 'constituent power' in the Constitution. It was mentioned for the first time in the Twenty Fourth Amendment, borrowing the words of the judges. From the First to the Twenty Fourth Amendment this phrase was not used.

I shall now analyse the reasons why this distinction arose in the minds of some of the judges. In the Golaknath case, I had not denied the power to alter the chapter on Fundamental Rights. I had merely said that this constituent power must flow expressly again from the people who had put an embargo through Article 13. In other words the Constitution could be altered but no part of it could be disregarded. I suggested going to the people and taking power first to amend article 368 and then to amend the Constitution. This was not accepted and in the Kesvananda case the suggestion was rejected.

In the judgment in Kesvananda case reliance was placed on the Privy Council case in Mc Cawley v. The King.[25] But to understand the passages relied upon the fundamental facts about the so-called constitution of Queensland must be appreciated. The Legislature of Queensland had power, by ordinary enactment passed by both houses and

assented to by the Governor in the name of the Crown to alter the Constitution of Queensland. It was a 'flexible' constitution as opposed to a 'rigid' constitution,in fact too flexible!

The legislature of Queensland was however, also governed by an Order in Council of June 6, 1859. It was held that the Legislature of Queensland had power to include in an Act a provision not within the express restrictions contained in the said Order in Council of 1959, but inconsistent with a term of the constitution of Queensland, contained in that Order and in the Constitution Act of 1916, without first amending the term in question under the powers of amendment given to it.

The facts are so different from our cases and the provisions so clearly of a different types that no assistance can really be got from general observations. After all that case decided a very special question which did not and could not arise here. Indeed Lord Birkenhead said:

> "Some communities, and notably Great Britain, have not in the framing of the Constitutions felt it necessary or thought it useful, to shackle the complete independence of their successors,"

and added:

> "The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

Our Constitution within itself spoke of restrictions upon the powers of the State and defined in Article 12 the expression "State" to embrace all

legislative and executive agencies. It said that the State shall not make a law affecting adversely the rights guaranteed in Part III. In my opinion the matter rested there. The judges who were of the view that Article 368 did not 'controlled Article 368 did not read the amendments now made, as if they were made already. Some of the judges came to the scene holding views adverse to the Golaknath case and one atleast expressed himself even before he sat in the Court.

In the next case Bribery Commissioners v. Ranasinghe (1964) 2 W.L.R. 1301 the question arose under the Ceylon (Constitution) Orders in Council, 1946/47. These did not expressly protect the power and jurisdiction of Courts which was dealt with by the Courts Ordinance cap.6. The question before the Privy Council was whether the statutory provisions for the appointment of members of the panel of the Bribery Tribunal otherwise than by the judicial Services Commission conflicted with section 55 of the Constitution. Their Lordships found a plain conflict between section 55 of the Constitution and section 41 of the Bribery Amendment Act under which the panel was appointed. In support of the claim of validity reference was made to the Mc Cawley case. Their Lordships distinguished it, for the reasons which I have given here. After quoting the passages from the opinion of the Lord Chancellor (quoted by me here) their Lordships observed:

> ".... a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make laws. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled" as the Board held the Consti-

Their Lordships found the difference to be in the manner of voting and held the law to be void. The question remains whether the requirements of Art.13 had primacy. None of these cases solved that issue, and the Article, which was not allowed to speak, if it spoke, could solve the issue. In my humble opinion the earlier view in Golaknath case was not adequately met. It was only said that Parliament could not destroy the basic structure of the Constitution but it could amend or alter or remove any other provision. It was declared that the Fundamental Rights Declared therein were not part of the basic structure. Here again I say that the basic structure (the case did not specify what it meant) includes everything which results from the Preamble and that if anything does flow from the Preamble it is Part III in so far as it protects the Fundamental Rights but Part Four certainly does not.

It remains to mention that Parliament being thus reassured about its powers began to amend the Constitution in a summary way. It protected legislation from the Constitution itself through amending Acts which only gave the short title and a list of Acts and Regulations included in the Ninth Schedule. The Thirty Fourth, Thirty Ninth and Fortieth Amendment Acts have long lists and sometimes an Act or two, having nothing to do with reforms, agrarian or other, were also included.

Parliament went much further thereafter. In the Forty Second Amendment Act many inroads were made in the jurisdictions of the Supreme Court and the High Courts. I do not mention them because a year later all that was undone by Parliament itself. There remained however the amendment effected in Article 31C. which after amendments made immune any legislative

measure which declared that it was being framed in pursuance of "all or any of the principles laid down in Part IV." Article 368 was further amended by adding two more clauses. They were -

> "(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation, whatever on the constituent power of Parliament to amend by way of addition, variation or repeal, the provisions of this Constitution under this article."

In 1978 came the Forty-fourth Amendment Act. It omitted sub-clause (f) of Article 19(1), omitted the heading "Right to Property", Article 31 and all references to Article 31 wherever found. Many sections were omitted but presumably only prospectively. A new Article 300-A was added, I had mentioned Part XIII by way of example in my judgment in Golaknath case. As no other place was found the new article was placed before Part XIII and curiously enough Article 300A preceded Article 300! It read:

> "300A. Persons not to be deprived of property save by authority of law: No person shall be deprived of his property save by authority of law."

The Forty-second Amendment Act came before the Supreme Court in the Minerva Mills case.[26] Section 55

of that Act was held constitutional. By that amendment clauses (4) and (5) were added to Article 368. I read these clauses just now. All the five judges of the Constitution Bench agreed to strike down these clauses although the reasons were somewhat different. As regards section 4 of the Amending Act which amended Article 31C there was a difference. Four learned judges struck down the section, while one learned judge dissented. You will remember that Article 31-C in its unamended form was accepted in Kesvananda case. Then only Article 39 was mentioned. The extension to all and any of the principles of Part IV was held to be destructive of the basic features of the Constitution. The reason given in the operative order may alone be quoted:

> "Section 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14 or Art.19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."

It is a pity that the learned judges did not seek support from the cases earlier than Kesavananda case. The reasoning adopted in that case would permit the removal of the whole chapter. This was noticed but not commented upon. This was the last case in the series which began with Sajjan Singh case in which for the first time Shankari Prasad case was questioned. I agree with the conclusions of the majority in the Minerva Mills case.

During the years after my retirement from the Supreme Court, I had again and again advised removal of right to property from Article 19 and its protection in a different way. In my Shri Ram Memorial Lecture I said:

> "I have said it before and I say it again that it was a mistake to shelter property right as a Fundamental Right. It is the weakest right and enjoyed by the concession of the State. All that was necessary was to extricate the provision concerning property from the Fundamental Rights chapter and give it protection of a different kind as has been done in Part XIII in regard to Trade Commerce and Intercourse within the Territory of India. For this purpose the people's consent was expressly necessary." 27

I, however, viewed the Natural Rights mentioned in Article 19 differently. I considered it my duty to protect them, instructed by James Madison's remarks, when he advocated the Bill of Rights in the First Congress. The remarks were:

> "[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights, they will have an impenetrable bulwark against every assumption of power in the Legislature or Executive, they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution by the declaration of rights."

In the end I must say that what I advocated was acted upon but without protection as I intended. All property has been treated alike in Article 300A which has been placed before Article 300 with which Part XIII

opens. All property is now exposed to the vagaries of political thinking. As Coolley said:

> "Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment and disposition of." 28

Some of these needed to be made an exception and given higher protection in Article 300 A. Let us hope that our law makers will bear this in mind.

In the end I can only say that I considered it my duty to see that every declaration of the Preamble, also enshrined in the chapter on Fundamental Rights and protected by the wide and all-embracing language of Article 13 should be observed. I found that property could not be treated on par with life and liberty. Subbarao C.J. and others wished to strengthen right to property so that it could equal the Natural Rights. I thought that the Supreme Court was going to water down the Natural Rights by giving them the same short shrift as they had given to property rights. Parliament took my suggestion and removed right to property from the Chapter on Fundamental Rights. I wait and see if the judges will give support to my views regarding the inviolability of Natural Rights, unless the people give power to their representatives to make any of them vulnerable to ordinary legislation. I agree with Justice Douglas that if the Constitution withdraws from Government all powers of the subject matter in an area, there can be nothing on which authority may be exerted.

I have now done and I thank the Chancellor, the Vice-Chancellor and other University authorities for this honour and the patience they have had over the years and now for the few days I have been reading these lectures.

1. A.I.R. 1967 SC 1643

2. A.I.R. 1951 SC 458.

3. A.I.R. 1950 SC 869.

4. A.I.R. 1954 SC 92.

5. (ibid) p.95.

6. A.I.R. 1954 SC 119.

7. Constitutional Limitations 8th Edn. 1119.

8. A.I.R. 1954 SC 282.

9. A.I.R. 1965 SC 845.

10. The expression 'acquired rights' is taken from the title of his book.

11. Subodh Kashyap: Jawaharlal Nehru and the Constitution P. 328.

12. The Supreme Court and the Supreme Law (1954) p.38.

13. 307 U.S. 433 (1939)

14. Shriram Memorial Lecture, A Judges Miscellany (1972) p. 1.

15. A.I.R. 1954 SC 170.

16. A.I.R. 1967 S.C 637.

17. A.I.R. 1969 SC 634.

18. A.I.R. 1970 SC 564.

19. A.I.R. 1965 SC 1017.

20. A.I.R. 1965 SC 1096.

21. My Own Boswell.

22. A.I.R. 1971 SC 530.

23. (ibid) p.557.

24. A.I.R. 1973 SC 1461.

25. [1920] A.C. 691 P.C.

26. A.I.R. 1980 SC 1789.

27. See note 14 above.

28. Constitutional Law 4th Edn. p.392.